find a correlation between a felon's actions, such as touching a firearm, to an increase in danger to life. This rationale would pull the conversation away from disputing over dictionary definitions and back towards the practical aims of criminal justice: reducing overall societal harm by deterring dangerous conduct, promoting felon reintegration into society, and improving institutional efficiency by freeing judicial resources from nonviolent crimes.

The rationale behind felon-in-possession laws is grounded in prevention of danger, risk reduction, and public safety. Rather than penalize a past harm, possession offenses look forward and punish the *potential* for harm. Felons — along with drug users, minors, and illegal aliens — are singled out for handgun possession because these groups supposedly pose an enhanced risk of harm due to certain inherent characteristics.[46] This concern outweighs the Second Amendment right to bear arms because the interest at stake is human life — the "supreme value that the law should strive to protect."[47]

Considering this rationale, the language as well as many current interpretations of § 922(g) by courts are over-inclusive and inconsistent with the statute's purpose. Section 922(g) includes felonies that are not in any way correlated with gun violence, such as mail fraud and marijuana possession.[48] Further, the statute enables the reincarceration of felons for benign actions that create no risk to public safety.[49] The outcome advocated for by the *Smith* dissent provides an example: Smith did not jeopardize the life of any innocent person by touching the gun at his friend's house, and yet Judge Smith still would have upheld his conviction under a strict reading of § 922(g). Taken together, though "possess" is technically a verb, the myriad grab-bag of physical actions that constitute actual possession and the extensive reach of constructive possession make it such that *being* in possession is the crime.[50] Indeed, the only way for a felon to escape liability for possession is to rid his home entirely of guns and ammunition, including those owned by family

[46] Andrew Ashworth, *The Unfairness of Risk-Based Possession Offences*, 5 CRIM. L. PHILOS. 237, 239 (2011).
[47] *Id.* at 250.
[48] Zach Sherwood, *Time to Reload: The Harms of the Federal Felon-in-Possession Ban in a Post-*Heller *World*, 70 DUKE L. J. 1429, 1431–53 (2021). Section 922(g) also curiously maintains a carveout for certain white-collar crimes. *Id.*
[49] Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIM. 831, 915 (2001).
[50] *Id.*

members.[51] Thus, without requiring a connection to risk, § 922(g)'s prohibition on possession is functionally a status crime.[52]

The principle that an action should be correlated with increased risk in order to qualify for conviction is implicit in many Supreme Court cases involving possession statutes like § 922(g). In *Muscarello v. United States*[53] and *Smith v. United States*,[54] the Supreme Court grappled with 18 U.S.C. § 924(c)(1), which prohibits "carrying" and "using" a firearm "in relation to a drug trafficking crime." In reaching its conclusions in these cases, the Supreme Court discussed at length that the overarching purpose of these statutes is to "combat the dangerous combination of drugs and guns" and "to persuade the criminal to leave his gun at home."[55] In other words, carrying and using a firearm during a drug trafficking crime creates additional risk. This is because drug transactions involve large sums of money, and altercations could easily result given the high pressure and stakes. Possession of firearms increases the risk of injury in such situations because of the inherently deadly nature of guns, as opposed to a fist fight. The Court noted that by contrast, using a gun to scratch one's head at home would not qualify as criminal conduct because it would not substantially increase the risk of injury or fatality.[56]

While § 922(g) lacks a clause explicitly stipulating the risky activity needed to convict for possession like § 924(c)(1), many circuit courts allow juries to consider the riskiness of the defendant's behavior during deliberations.[57] For example, in *United States v. Wilson*, the Ninth Circuit noted that the possibilities for why a felon may have touched a gun are endless, but deliberation is up to the jury to determine if any of the possibilities are sufficient to create a reasonable doubt as to the defendant's guilt.[58] In other words, there are myriad circumstances under which a defendant could come in contact with a gun,

[51] Sherwood, *supra* note 48, at 1443; *cf.* Emma Luttrell Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing Status, Disparately Affecting Black Defendants, and Continuing the Nation's Centuries-Old Methods to Disarm Black Communities*, 21 CUNY L. REV. 144, 144–48 (2018) (describing conviction of felon for possession after he took over deceased parents' apartment to care for adopted sister because his parents had left box of ammunition on premises).
[52] Dubber, *supra* note 49, at 915 (arguing possession crimes have come dangerously close to rebirth of vagrancy laws).
[53] 524 U.S. 125 (1998).
[54] 508 U.S. 223 (1992).
[55] *Muscarello*, 524 U.S. at 132.
[56] *Smith*, 508 U.S. at 232.
[57] *See, e.g.*, United States v. Wilson, 922 F.2d 1336, 1339 (9th Cir. 1991).
[58] *Id.* (stating in dicta that "mere touching does not amount to possession").

but only some — that is, the types of conduct that create risk to life — warrant conviction for possession. Similarly, in *United States v. Teemer*,[59] the First Circuit recognized that there are many situations in which holding a weapon briefly could "come within the letter of the law but in which conviction would be unjust."[60] The court reasoned that these edge cases were best left to the common sense of prosecutors and juries.[61] Implicit in this case as well as *Wilson* is the idea that many physical acts could qualify as possession under a strict reading of the law. However, many actions do not actually create risk of harm — and because of this lack of actual risk creation, the defendants should not be convicted.

In *Smith*, Judge Haynes failed to articulate the need to connect the defendant's act to the creation of risk. Her holding that touching alone is never sufficient to constitute possession simply raises the threshold for establishing a prima facie case while not actually addressing the underlying question of risk. The effect is both a reduction in false positives and an increase in false negatives.[62] The latter is socially undesirable and is not a necessary tradeoff for achieving the former. On the other end of the spectrum, Judge Smith's proposed rule that categorically equates mere touching with possession would lower the threshold for conviction, thus increasing false positives and decreasing false negatives.

While Judge Haynes's method may be the better of two options under a Blackstonian view — it is better to let ten guilty persons escape than let one innocent person suffer — courts should be aspiring to fashion legal doctrine in a way that reduces *both* types of error. Judge Haynes, in analyzing Smith's case, should have focused the inquiry of actual possession on the degree of risk created by Smith's activities. By centering the analysis on this principle, the court could have shifted this area of law away from formalist thresholds and in favor of a functionalist framework that better protects the rights of felons and other individuals covered by § 922(g) by focusing on individual context. It could have also paved the way for

[59] 394 F.3d 59, 62 (1st Cir. 2005).
[60] *Id.* at 64 (listing examples such as "if a schoolboy came home with a loaded gun and his ex-felon father took it from him, put it in the drawer, and called the police" or "if a mother . . . threw into the trash an envelope of marijuana found in her daughter's bureau drawer").
[61] *Id.*
[62] As noted in *Teemer*, there are many situations where merely touching a gun without exerting ownership or dominion could generate a high amount of risk. *Id.* For example, Judge Haynes's rule would exculpate an ex-felon who, while robbing a convenience store, grasped the store owner's gun behind the counter.

reconstructing the contours of constructive possession to allow for more leniency for felons engaging in nonviolent, otherwise lawful behavior.

A risk-reduction framework would be consistent with many of the Fifth Circuit cases that Judge Haynes and Judge Smith cited in *Smith*. In *United States v. Hagman*,[63] the defendant was a convicted felon charged with possessing and bartering a stolen firearm under 18 U.S.C. § 922(j). The court found that there was no evidence that Hagman touched the guns so there was no actual possession.[64] A risk-reduction inquiry would have reached the same result because the defendant, by failing to touch or come in contact with the guns, did not contribute to the risk-generating activity of trading stolen firearms. In *United States v. Tyler*,[65] the defendant was charged with receiving and possessing stolen property from a federally insured savings and loan association after his fingerprints were found on a check. Under a risk-generation inquiry, the defendant's act of possessing the check would have been tied to the risk (or in this case, the harm that had already occurred) associated with stealing federally insured funds. Finally, in *United States v. Jones*,[66] an officer allegedly saw the defendant remove a handgun from his waistband and place it under a friend's house. The court stated that "if the jury believed the [officer's] testimony *in toto*, the government would have established . . . Jones's direct physical control of the firearm."[67] Under a risk-generation framework, the court would not only determine in a yes-or-no fashion whether Jones held the gun, but also ask whether Jones's holding of the gun generated risk of danger. Unlike the previous two cases, there is no risky illegal activity tied to the defendant's possession of the gun, so a deeper inquiry into the defendant's motives and history would be the next step in this framework.

To be sure, one could argue that courts do not have the authority and/or competency to be deciding the issue of whether a particular action creates risk, as such changes in legal analysis qualify as policymaking and are thus better left to legislatures. However, as the First Circuit stated in *Teemer*, "no legislature can draft a generally framed statute that anticipates every untoward application and plausible

[63] 740 F.3d 1044 (5th Cir. 2014).
[64] *Id.*
[65] 474 F.2d 1079 (5th Cir. 1973).
[66] 484 F.3d 783 (5th Cir. 2007).
[67] *Id.* at 789. The court's ruling on actual possession in this case was dictum only and would not require explicit overruling.

exception."[68] It is the place of the courts to synthesize the rationale underlying these broad statutes and to "fill . . . gaps with glosses and limitations."[69] Moreover, courts serve the other, equally important purpose of safeguarding the rights of those who have less power in the political process. The defendants of felon-in-possession crimes are systematically disenfranchised for life, so legislatures have little incentive to consider their interests.[70] Thus, courts must assume the role of actively intervening to protect their rights.

In holding that touching a gun is insufficient to convict for possession, the Fifth Circuit took a significant step in narrowing the scope of "possession" under § 922(g). But its holding was overly broad, and the majority's reasoning failed to consider the principle of risk reduction that undergirds felon-in-possession laws. Their conclusion that touching alone can never constitute possession simply raises the threshold for establishing a prima facie case, which trades off fewer false positives for more false negatives. The court should have instead centered the contours of analyzing possession offenses around specific, risk-generating activity. This would reduce both types of error by forcing courts to correlate a defendant's actions to an actual increase in risk of danger. Such an inquiry would mitigate overall societal harm while also avoiding reincarceration of felons for non-violent acts. The latter goal not only benefits the individual defendants but also more efficiently allocates judicial resources. Cabining the expansion of statutory possession offenses by tying the defendant's actions to creation of increased risk of danger would thus better serve the aims of criminal justice.

[68] 394 F.3d 59, 64 (1st Cir. 2005).
[69] *Id.*
[70] Dubber, *supra* note 49, at 920.

Applicant Details

First Name	**Elias**
Middle Initial	**WH**
Last Name	**Daiute**
Citizenship Status	**U. S. Citizen**
Email Address	**ewd2118@columbia.edu**
Address	**Address** Street **531 W 112th Street, Apartment #1E** City **New York** State/Territory **New York** Zip **10025**
Contact Phone Number	**4132104809**

Applicant Education

BA/BS From	**Yale University**
Date of BA/BS	**May 2019**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Law and Social Problems**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Krent, Stephanie
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Emens, Elizabeth
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Briffault, Richard
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Richman, Dan
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 11, 2023

The Honorable Juan R. Sanchez
United States District Court
Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Chief Judge Sanchez:

I am a rising third-year student and member of the Journal of Law and Social Problems at Columbia Law School. I write to apply for a clerkship in your chambers beginning in 2024 and for any subsequent term. As a student with an interest in pursuing public service, I believe I would be a particularly good fit for your chambers.

Enclosed please find my resume, transcript, and writing sample. Also enclosed are letters of recommendation from Professors Richard Briffault ((212) 854-2638, rb34@columbia.edu), Elizabeth Emens ((212) 854-8879, eemens@law.columbia.edu), Daniel Richman ((212) 854-9370, drichm@law.columbia.edu), and Stephanie Krent of the Knight First Amendment Institute (stephanie.krent@knightcolumbia.org). My writing sample has not been edited by others.

Thank you for your consideration. Please do not hesitate to contact me should you need any additional information.

Respectfully,

Elias William Howland Daiute

Elias WH Daiute

531 West 112th Street, #1E, New York, NY 10025 • 413-210-4809 • Elias.Daiute@Columbia.edu

EDUCATION

COLUMBIA LAW SCHOOL, *New York, NY*
Juris Doctor expected May 2024

Honors: James Kent Scholar (1L, 2L)
Robert Noxon Toppan Prize for Excellence in Constitutional Law
Activities: Executive Publications Editor, Journal of Law and Social Problems
Teaching Fellow to Professor Emens (Contracts, Spring 2023)
Teaching Fellow to Professor Ahmed (Constitutional Law, Fall 2023)
Teaching Fellow to Professor Murray (Law of the Political Process, Spring 2024)
1L Representative, American Constitution Society

YALE UNIVERSITY, *New Haven, CT*
Bachelor of Arts in Political Science received May 2019

Honors: Distinction in Major
Thesis: *Divided Government and the Initiative: The Intersection of Two Political Themes*
Activities: Yale Whiffenpoofs, Yale Alley Cats A Cappella
Student Advisory Committee, Political Science Advisory Committee

EXPERIENCE

Sullivan & Cromwell LLP New York, NY
Summer Associate May 2023–Present
Draft memoranda and conduct research regarding ongoing litigation. Assist in various pro bono projects, including a Legal Aid Society project regarding unsubstantiated reports of child neglect. Expect two-week secondment to JASA.

Knight First Amendment Institute at Columbia University New York, NY
Extern Jan 2023–April 2023
Drafted letters for clients, conducted research, and wrote memoranda regarding First Amendment issues. Attended litigation meetings. Reviewed FOIA production documents and coordinated with FOIA offices regarding pending productions.

Chambers of Judge Valerie Caproni, Southern District of New York New York, NY
Intern May 2022–August 2022
Researched and wrote memoranda and draft opinions on cases in the Southern District regarding contract disputes, administrative proceedings under the Individuals with Disabilities Education Act, and procedural rules for collective action claims. Conducted spot research and cite checks at the request of Judge Caproni and her clerks.

Office of Governor Janet T. Mills Augusta, ME
Intern May 2021–August 2021
Researched and wrote reports regarding Maine Native tribes' rights, Maine's yellow flag gun law, legal ethics, and other topics for the Governor's Chief Legal Counsel. Corresponded with dozens of constituents daily through phone and email, and assisted in filing and organizing ongoing congressional bills.

Maine Volunteer Lawyers Project Portland, ME
Intern October 2020–May 2021
Conducted over 200 client intake interviews for the Family Law Courthouse Assistance Project, discussing clients' experiences with divorce, domestic violence, and/or parental rights and responsibilities. Managed over 24 weekly legal client consultations. Contacted over 100 lawyers across Maine to update outdated case records.

Simpson Thacher & Bartlett LLP New York, NY
Corporate Paralegal June 2019–June 2020
Coordinated with over 20 administrative assistants, multiple senior managing directors, and partners to execute organizational documents under tight deadlines on behalf of a private equity firm and other clients. Spearheaded administrative operations as the sole STB paralegal for the largest private real estate transaction in history. Interviewed clients, spoke on career panels, and compiled documentation for over seven pro bono events, including DACA renewals, veterans' disabilities insurance claims, and Urban Education Initiative programs.

INTERESTS: Singing, board games, running (slowly)

Columbia Law School

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CLS TRANSCRIPT (Unofficial)

06/07/2023 10:06:59

Program: Juris Doctor

Elias William Howland Daiute

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6299-1	Ex. The Knight First Amendment Institute	DeCell, Caroline; Diakun, Anna	2.0	A-
L6299-2	Ex. The Knight First Amendment Institute - Fieldwork	DeCell, Caroline; Diakun, Anna	3.0	CR
L6429-1	Federal Criminal Law	Richman, Daniel	3.0	A-
L6683-1	Supervised Research Paper	Briffault, Richard	1.0	A
L6822-1	Teaching Fellows	Emens, Elizabeth F.	4.0	CR

Total Registered Points: 13.0

Total Earned Points: 13.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6238-1	Criminal Adjudication	Richman, Daniel	3.0	A-
L6241-2	Evidence	Capra, Daniel	4.0	A
L6425-1	Federal Courts	Metzger, Gillian	4.0	A-
L6675-1	Major Writing Credit	Briffault, Richard	0.0	CR
L6683-1	Supervised Research Paper	Briffault, Richard	2.0	A

Total Registered Points: 13.0

Total Earned Points: 13.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6108-4	Criminal Law	Seo, Sarah A.	3.0	B+
L6679-1	Foundation Year Moot Court		0.0	CR
L6474-1	Law of the Political Process	Greene, Jamal	3.0	A
L6121-17	Legal Practice Workshop II	Askanase, Eric S.	1.0	HP
L6116-4	Property	Merrill, Thomas W.	4.0	A-
L6118-2	Torts	Rapaczynski, Andrzej	4.0	A-

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-8	Legal Methods II: Impeachment	Bobbitt, Philip C.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-2	Civil Procedure	Genty, Philip M.	4.0	A-
L6133-7	Constitutional Law	Murray, Kerrel	4.0	A
L6105-4	Contracts	Emens, Elizabeth F.	4.0	A
L6113-2	Legal Methods	Briffault, Richard	1.0	CR
L6115-17	Legal Practice Workshop I	Askanase, Eric S.; Hopkovitz, Yael	2.0	P

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 57.0

Total Earned JD Program Points: 57.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	James Kent Scholar	2L
2021-22	Robert Noxon Toppan	1L
2021-22	James Kent Scholar	1L

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to recommend Eli Daiute for a clerkship in your chambers.

My name is Stephanie Krent, and I am a staff attorney at the Knight First Amendment Institute at Columbia University. I graduated from Yale Law School in 2016. After that, I worked as an associate at Jenner & Block from 2016–2017 before clerking for Judge Edgardo Ramos of the Southern District of New York from 2017–2018, and for Judge Julio M. Fuentes on the Third Circuit Court of Appeals from 2018–2019. I have been working at the Knight Institute as a legal fellow, and then as a staff attorney, since the fall of 2019. It is through this role that I was fortunate enough for work with Eli as one of his supervisors in the spring of 2023.

Eli joined the Knight Institute with a keen interest in the way free speech and technology shape political discourse, and his work throughout the semester reflected a deep understanding of First Amendment theory and legal strategy as well as the relevant legal doctrine and factual research. No doubt due in part to his past experience as a judicial intern working on many different types of cases, Eli managed a diverse docket of Knight Institute cases with aplomb, earning the admiration of many Institute lawyers. I worked particularly closely with Eli on A.B.O. Comix v. San Mateo County, a challenge to the surveillance and destruction of mail in a county jail system, and I was impressed at every turn.

Eli excelled on two particularly challenging long-term assignments on the application of First and Fourth Amendment doctrine to the facts of our case. In both instances, his legal research was thorough, his writing was crisp and well-organized, and his work was done efficiently. Because he was so enmeshed in the case, he wrote creatively and compellingly about how we might be able to marshal helpful cases and distinguish less helpful ones. Like many lawyers at the Institute, I tend to give thorough feedback to externs and interns, ranging from bluebooking corrections to high-level structural suggestions to clarifications about legal issues that may not have been accounted for adequately in initial drafts. But with Eli's work, I found that I had no more than one or two high-level suggestions, and almost no need for any other editing. In fact, my biggest contribution seemed to be assuring Eli that he had done an excellent job.

Because we filed A.B.O. Comix in the semester that Eli was working at the Knight Institute, there was also no shortage of last-minute work to go around. Short-term projects can be difficult for externs because there is less margin for error and less time to get comfortable with a new area of law. Not so for Eli, though. He had an almost uncanny ability to immediately understand the question asked, to go about researching the answer in a thoughtful and efficient way, and, most impressively of all, to know when he had enough clarity to share his findings back to the team. Similarly, when asked to complete a time-sensitive cite check, Eli finished early, without any compromise in the quality or comprehensiveness of his work, and proposed solutions for every issue he identified.

Beyond his written work, Eli was a stellar team member. He was eager to dive into his projects, asking insightful questions in team meetings and his externship seminar about legal strategy and long-term goals. He took ownership over his assignments by proactively providing updates into his progress and managing time effectively. He often stopped by my desk to check in on how I was doing, and to see if there was anything more he could do to help the case advance. He treated everyone at the Institute with the utmost respect and kindness, adding a welcome presence to our weekly litigation meetings. In short, he is the type of colleague that anyone would be lucky to have.

I can say with confidence that Eli would make an exceptional law clerk. His work ethic, integrity, and autonomy will be invaluable in managing a large docket and staying organized. And his strengths in research and writing will undoubtedly be a huge asset in drafting opinions and preparing for oral argument or case conferences. I am so pleased that after he clerks, Eli hopes to return to public interest law, where I am sure he will continue to shine. Please let me know if I can provide any additional information that would help you in assessing his application. You can reach me at stephanie.krent@knightcolumbia.org or (646) 745-8615.

Stephanie Krent
Knight First Amendment Institute
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June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Mr. Elias Daiute for a clerkship in your chambers. Mr. Daiute is a very smart, talented, and collegial law student, who I expect will be an excellent clerk.

I know Mr. Daiute in two ways: as a student in my Contracts class in Fall 2021 and as a Teaching Assistant for my Spring 2023 Contracts course. I therefore have a strong basis on which to comment on Mr. Daiute's performance and prospects.

My introduction to Mr. Daiute came through first-year Contracts in the Fall of 2021. The grades in that course were based primarily on a difficult anonymously graded exam, which combined multiple-choice questions and essays. Students were required to write two essays: one analyzing traditional legal problems in order to predict how a court would decide them, and a second evaluating the conceptual underpinnings of contract law and applying them to specific doctrines. The exam also required students to apply their knowledge of doctrine to solve problems on a set of challenging multiple-choice questions.

Mr. Daiute earned an "A" in the course, based on his very strong performance on all portions of the exam. I wrote a note to myself on his policy essay that, were I to share student essays as models for that portion, his essay would definitely have been a model student answer. He also came to office hours to share his thoughtful reflections on a documentary on the Critical Legal Studies movement ("The Crits") that I shared with the class as an optional assignment.

I invited Mr. Daiute to serve as a Teaching Assistant for my Contracts class in the Spring of 2023, based on his excellent performance in Contracts and his very thoughtful application. His application impressed me with its thoughtfulness and concern for the students' learning experience, as well as his evident desire to learn and grow at every opportunity. It is my sense that, due to financial circumstances, Mr. Daiute has often had to take paid positions instead of extracurriculars, and I am struck by how much he has evidently learned and taken from those paid positions. For instance, he worked in the IT Department at Yale as an undergraduate, and he came to understand that experience as a form of teaching, enriching his communication skills, and supplementing his experience as a tutor. This is just one example of the ways he approaches his work, whatever it is, with curiosity, humility, and motivation. These seem important qualities in a student and a teacher—and a human being.

The responsibilities in this role include holding TA sessions once a week to review material with students, supporting the first-year students through the transition to the first semester of law school, supporting any teaching work in and out of the classroom, and reviewing and providing feedback on the midterm exams. Though this is not a graded position, my sense is that Mr. Daiute did a terrific job in this role.

Mr. Daiute has had an impressive law-school career thus far, both in his academic work and his involvement in the Columbia community. He was named a James Kent Scholar, Columbia Law School's designation of highest academic honors, for his first-year class performance. He also earned the Robert Noxon Toppan Prize for excellence in constitutional law. In addition to serving as my Teaching Assistant (TA) for Contracts, he is slated to serve as one for two classes next year: Constitutional Law and Law of the Political Process.

In addition to maintaining a very strong academic performance, Mr. Daiute has pursued leadership roles in several extracurricular opportunities at Columbia Law School. He is serving as the Executive Publications Editor for the *Journal of Law and Social Problems*—Columbia's only journal to publish exclusively student scholarship. As an extern for the Knight First Amendment Institute in the Spring of 2023, he wrote legal memoranda and conducted many spot research assignments. As a 1L representative with the American Constitution Society, Mr. Daiute helped to organize events focusing on criminal justice reform, restorative justice, and the structure of the Supreme Court. Through his roles as an Admitted Students Ambassador and Treasurer for Columbia's infamous Murder Mystery Society, Mr. Daiute also helped to foster a sense of community at Columbia for future and present students.

In his summers, Mr. Daiute is gaining experience that is building his already impressive skillset. During his 1L summer, he served as an intern for Judge Valerie Caproni of the Southern District of New York. Currently, Mr. Daiute is a Summer Associate at Sullivan & Cromwell, a position that will include a two-week secondment at JASA, a non-profit agency serving older adults in New York City.

In sum, Mr. Daiute is a very impressive law student and community member here at Columbia. I believe he will be an excellent clerk, and I recommend him to you very strongly.

Let me know if I can provide any other information. I would be happy to speak further. I am out of the office this Summer, but recommendations are a priority, and I can be reached through my assistant, Kiana Taghavi (ktaghavi@law.columbia.edu), or on my cell phone at 718-578-9469.

Sincerely,

Elizabeth Emens - eemens@law.columbia.edu - 212-854-8879

Elizabeth F. Emens

Elizabeth Emens - eemens@law.columbia.edu - 212-854-8879

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Elias W. Daiute

Dear Judge Sanchez:

I am writing in support of Elias W. Daiute of the Columbia Law School Class of 2024, who is applying to you for a clerkship. I recommend Eli with great enthusiasm. He is smart, hard-working, energetic, articulate, and very well-organized. He has a very strong academic record and considerable experience in legal research and writing. He will make an excellent law clerk.

I know Eli primarily from supervising his student Note, When a Debt is Paid: Assessing a Restitution Requirement for Future Ex-Felon Enfranchisement Initiatives, which addresses and responds to the failure of the Florida voter initiative intended to restore voting rights to ex-felons. The Note examines the history of felon disenfranchisement, the Florida ballot measure campaign, and especially the language in the initiative conditioning voting rights restoration on the "completion of all terms of sentence." That language which, Eli found, was crucial to the amendment's passage, was subsequently used by the Florida legislature to include "full payment of fines or fees ordered by the court as a part of the sentence" and "full payment of restitution ordered to a victim." That legislative restriction effectively negated the amendment for many ex-felons due to a combination of obvious inability to pay and a host of administrative obstacles that made it difficult for many ex-felons to determine how much they owed. After tracing the litigation that unsuccessfully sought to challenge the Florida repayment statute, Eli then turned to the question of what, as a matter of both politics and principle, would be an appropriate payment to require of ex-felons as part of the "completion of their sentence."

After a careful review of theories of punishment, the politics of felon franchise restora-tion, and the practical difficulties of calculating and paying the sums due, Eli recommended that ex-felons be required to pay any court-ordered restitution to victims but not any other legal financial obligation as a condition for the restoration of voting rights. He argued that politically some payment of legal financial obligations would be required in order to obtain necessary voter support, and that restitution had the advantages of both demonstrating personal responsibility for the prior offense as well as relative ease of administration. Conversely, he found, fees and fines served much less of a rehabilitative purpose and were often more difficult to administer.

Eli did an excellent job with the Note. It really covers all the bases – history, politics, le-gal doctrine, theories of punishment – and is very well-written. I had a number of conversations with Eli as he developed and revised the Note and I was consistently impressed with his commitment to writing something that combined both respect for the views of those who thought that some discharge of legal financial obligations is a prerequisite for rights restoration and commitment to the restoration of rights. Eli was looking for a compromise solution that is both sound on principle and politically viable. I think he did the job.

Eli also has a very strong academic record at Columbia. He was recognized as a James Kent Scholar – our highest academic honor – in his 1L year, and was awarded the Robert Noxon Toppan Prize for his work in Constitutional Law. Based on his Fall 2022 grades, I expect he will be a Kent Scholar for his 2L year as well. Eli has considerable additional research, writing, and editing experience, including work as an intern in the chambers of Judge Valerie Caproni, as an extern at the Knight First Amendment Institute, and as the Executive Publications Editor of the Columbia Journal of Law and Social Problems.

Based on his strong academic record and his excellent research and writing ability I am happy to recommend Eli Daiute to you for a clerkship. Please call me at 212-854-2638 if I can be of any further assistance to you in assessing Eli's application.

Sincerely,

Richard Briffault
Joseph P. Chamberlain Professor of Legislation

Richard Briffault - richard.briffault@law.columbia.edu - 212-854-2638

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Elias W. Daiute

Dear Judge Sanchez:

I write to enthusiastically support the application of Elias W. Daiute, a rising 3L at Columbia Law School, Class of 2024, to clerk in your Chambers. I'm confident he would do terrific work for you.

I got to know Elias quite well in his 2L year, when he took my Criminal Adjudication course. It was a delight to have him. His intelligence and deep appreciation of criminal justice realities ensured that his contributions to discussions were always analytically sharp and nuanced. He did very well on the exam too. But what I truly enjoyed were his regular visits to my office with "questions." These never reflected a misunderstanding of the reading but rather a probing deconstruction of the reasoning in the cases. Elias's infectious engagement with the material invariably made these visits a highlight of my afternoon. My experience in the Spring, when Elias took my Federal Criminal Law course was similar. Once again, Elias had mastered the material and simply loved to tease it apart, with due humility and great humor.

Although I lack deep familiarity with Elias's writing, I saw that he has a very strong law school record. He won an award in 1L Con Law and received the highest honors (Kent) for that year. (Missing from Elias's application will be a recommendation letter from his Con Law prof, Kerrel Murray, who is now clerking for Justice Ketanji Brown Jackson and unable to write.) What Elias's transcript doesn't capture is his wonderful personality and incredible discipline. Coming from a very modest background, he held down a number of paid jobs while an undergraduate at Yale, including head of IT for a residential college. When not studying or working, he sang with an a cappella group, the Alley Cats, then took a gap year to sing with the Whiffenpoofs (while still holding down student jobs). This is someone you'd like working for you, whose work would be of the highest quality, and whose career thereafter will make you proud.

If there is anything further I can say that would be of use to you, please do not hesitate to call or e-mail.

Respectfully,

Daniel Richman

Dan Richman - drichm@law.columbia.edu - 212-854-9370

MEMORANDUM

TO:	Danielle Bernstein, Law Clerk
FROM:	Elias Daiute, Summer Intern
DATE:	May 25, 2022
RE:	Motion to Dismiss in REDACTED

INTRODUCTION

Parties

- Plaintiff:
  - REDACTED, a voice coach and former employee of REDACTED
- Defendants:
  - REDACTED ("the Studio")
  - REDACTED, sole owner and principal of the Studio.

Plaintiffs' claims

1) Breach of Contract
2) Breach of the Implied Covenant of Good Faith and Fair Dealing
3) Unjust Enrichment
4) Defamation *Per Se*

Recommendation:

1) Motion to Dismiss GRANTED without prejudice

BACKGROUND

I. General Background

a. Background Relationship

i. In 2015, Plaintiff partnered with the Studio to establish the REDACTED Center for Voice and Speech. First Am. Compl. ("FAC") (Dkt. 27) ¶ 6.

ii. Plaintiff offered a program through the Studio, *id.* ¶ 7, which cost approximately $29,000 in tuition per student, *id.* ¶ 16. Students who participated in the program were granted the certification of REDACTED ("RRT"). *Id.* ¶ 7.

b. The Agreement

i. On March 14, 2018, Plaintiff and the Studio executed a document entitled "Employment Agreement Between REDACTED and REDACTED Studios" (the "Agreement"). *Id.* ¶ 10. The Agreement provides that, in the absence of a compensation guarantee, the Studio pay Plaintiff 50% of the net profit for her sessions in connection with the Studio. Def. Decl. of Def. Motion to Dismiss First Am. Complaint, Ex. 1, Dkt. 35. "When she is given a compensation guarantee," the Agreement provides that the Studio pay Plaintiff a "flat $3,000 USD per day." *Id.* ¶ 12.

ii. Since 2018, thirty students have enrolled in the RRT program, for a total of approximately $870,000 in revenue. Plaintiff alleges that she has been paid nothing for these RRT programs. *Id.* ¶ 14.

iii. Plaintiff is "not aware of any instances in which the parties agreed to a compensation guarantee," but alleges that she was paid at the alternative rate of $3,000 per day at all times prior to 2018. *Id.* ¶ 15.

iv. Though the agreement was to remain in effect until March 14, 2021, Plaintiff "refused to provide any additional services on behalf of the studio" in or about September 2020, after having received only a "small fraction" of what she is allegedly owed by the Studio. *Id.* ¶ 14.

c. Non-RRT activities

i. In addition to the RRT program, Plaintiff taught other non-RRT workshops, *id.* ¶ 8, provided individualized instruction, *id.* ¶ 5, gave a keynote address for Bank of America for which the Studio negotiated a speaking fee, *id.* ¶ 22,

and "filmed, wrote, and performed in a multi-volume series" that the Studio has been selling, *id.* ¶ 25. Plaintiff alleges that she has received only $220,000 for these non-RRT activities, "well short" of the amount Plaintiff alleges she is owed, *id.* ¶ 27, and further alleges that she has received no compensation for the individualized instruction, keynote address, or the sales and licensing of the videos, *id.* ¶¶ 21, 23, 26.

d. Defamation

i. Plaintiff alleges that REDACTED made false and defamatory statements about REDACTED. *Id.* ¶ 28.

ii. Plaintiff alleges that REDACTED stated to at least two students that REDACTED "received all of the tuition paid by the students for her courses, except for a modest 'room fee' which was retained by the Studio." *Id.* Plaintiff alleges that REDACTED made these statements to deflect blame away from herself at a time when students were "clamoring for a refund" of their tuition. *Id.* ¶ 29. Plaintiff bases this belief on reports from Plaintiff's students during a Zoom conference on December 17, 2020. Plaintiff further alleges that "other students have subsequently related that REDACTED has made these … statements concerning REDACTED to the effect that the Studio only retained a small facility fee and REDACTED retained the large majority of the fees paid by REDACTED's students to the Studio." *Id.* ¶ 30.

iii. Plaintiff alleges that on December 23, 2020, REDACTED "sent an email to numerous individuals, all students of REDACTED, that falsely stated that 'REDACTED was paid hundreds of thousands of dollars in 2019.'" *Id.* ¶ 32.

iv. Plaintiff alleges that REDACTED made statements to at least two of Plaintiff's students "stating that the inadequate ventilation and sweltering conditions in the Studio was [*sic*] the result of REDACTED's insistence on a quiet environment in which to teach," whereas Plaintiff never insisted on any such conditions. *Id.* ¶ 33.

e. REDACTED's role

i. Plaintiff alleges that REDACTED has, at all relevant times, functioned as the sole decisionmaker for the Studio and "exercised complete control over it." *Id.* ¶ 33.

ii. Plaintiff alleges that REDACTED personally received funds from at least two of Plaintiff's students and asserts, on information and belief, that REDACTED has received other payments intended for the Studio for RRT instruction. *Id.* ¶ 34.

iii. Upon information and belief, Plaintiff alleges that "it appears that the Studio is now facing financial ruin due to REDACTED's siphoning of its funds for her own personal use," and that as a result, the Studio is not able to pay damages owed. *Id.* ¶ 37.

II. **Procedural History**

a. Plaintiff filed Complaint on September 2, 2021. Compl., Dkt. 4. Defendants filed a motion to dismiss Counts II, III, and IV of Plaintiff's Complaint on October 29, 2021. Dkt. 22-24. Plaintiff thereafter filed her FAC (Dkt. 27), which includes four counts: (i) breach of contract, pertaining not only to the Agreement but also to an implied agreement regarding non-teaching/workshop activities, including

specifically the video series, (ii) breach of the implied covenant of good faith and fair dealing, pertaining to both the written Agreement and any implied agreement that existed, (iii) unjust enrichment following the alleged breach of contract, and (iv) defamation *per se* regarding the statements allegedly made by REDACTED. FAC.

b. Defendants filed a motion to dismiss on December 21, 2021, moving to dismiss with prejudice all claims against REDACTED and Counts II, II, and IV in their entirety, Def. Mot. to Dismiss (Dkt. 33), on the grounds that Plaintiff has failed to meet her burden to pierce the corporate veil, that her implied covenant and unjust enrichment claims are duplicative of her breach of contract claim, and that her defamation claim (a) does not allege defamation, (b) lacks the requisite specificity, and (c) does not plead actual malice. *See id.* at 6, 11, 20.

DISCUSSION

Defendants' motion to dismiss should be granted, as (a) Plaintiff has not adequately demonstrated that REDACTED exercised complete domination over the Studio or that she used such domination to commit a fraud or wrong that injured the Plaintiff, as is necessary to pierce the corporate veil, (b) Counts II and III are duplicative of Count I, as written, and (c) Plaintiff has not pled her defamation claim with adequate specificity. Count I should be dismissed with prejudice insofar as it applies to REDACTED, and Plaintiff's implied covenant and unjust enrichment claims should be dismissed with prejudice to the extent that they pertain to the terms of the Agreement, as further amendment on either claim would be futile. However, Plaintiff should be given leave to amend on all other claims, as further amendment would not be futile, nor would it unduly prejudice Defendants. *See 24 Seven, LLC v. Martinez*, No. 19-CV-7320,

2021 WL 276654, at *11 (S.D.N.Y. Jan. 26, 2021) (permitting amendment when "(1) the party seeking the amendment has not unduly delayed, (2) when that party is not acting in bad faith or with a dilatory motive, (3) when the opposing party will not be unduly prejudiced by the amendment, and (4) when the amendment is not futile" (citation omitted).

I. Legal Standard

To survive a motion to dismiss for failure to state a claim upon which relief can be granted, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In general, "a complaint does not need to contain detailed or elaborate factual allegations, but only allegations sufficient to raise an entitlement to relief above the speculative level." *Keiler v. Harlequin Enters. Ltd.*, 751 F.3d 64, 70 (2d Cir. 2014) (citation omitted). The Court accepts all factual allegations in the complaint as true and draws all reasonable inferences in the light most favorable to the plaintiff. *See Gibbons v. Malone*, 703 F.3d 595, 599 (2d Cir. 2013). The Court is not, however, "bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555)).

II. Plaintiff Has Failed to Allege Facts that Would Permit Piercing the Corporate Veil

Defendants first argue that Plaintiff has failed to meet her burden to plead facts that would permit piercing the corporate veil, a prerequisite to reaching REDACTED personally on the breach of contract claim. *See* Def. Mem. at 6. The Court should accept this argument.

"New York law requires the party seeking to pierce a corporate veil to make a two-part showing: (i) that the owner exercised complete domination over the corporation with respect to the transaction at issue; and (ii) that such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil." *Am. Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir. 1997) (citing *Morris v. N.Y. State Dep't of Tax'n & Fin.*, 82 N.Y.2d 135, 141 (1993)). "Disregard of the corporate form is warranted only in extraordinary circumstances, and conclusory allegations of dominance and control will not suffice to defeat a motion to dismiss." *Société d'Assurance de l'Est SPRL v. Citigroup Inc.*, No. 10-CV-4754, 2011 WL 4056306, at *5 (S.D.N.Y. Sept. 13, 2011); *see also Murray v. Miner*, 74 F.3d 402, 404 (2d Cir. 1996).

Several factors are relevant to determining whether an individual has exercised complete domination over a corporation, including, *inter alia*,

> (1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arm's length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own.

Shantou Real Lingerie Mfg. Co. v. Native Grp. Int'l, Ltd., 401 F. Supp. 3d 433, 439–40 (S.D.N.Y. 2018) (citing *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131, 139 (2d Cir. 1991)).

The second prong, that the domination was used to commit a fraud or wrong, is satisfied when "the owners, through their domination, abused the privilege of doing business in the

corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene." *Shantou*, 401 F. Supp. 3d at 444 (citing *Morris*, 82 N.Y.2d at 142 (1993)).[1]

A. Plaintiff Has Not Alleged Adequately that REDACTED Exercised Complete Domination Over the Studio

Plaintiff falls short of alleging facts from which the Court could infer that REDACTED exercised complete domination over the Studio. First, Plaintiff's assertion that "REDACTED has functioned as the sole decisionmaker for the Studio and exercised complete control over it," FAC ¶ 33, is entirely conclusory, *see Iqbal*, 556 U.S. at 678, and her status as sole owner proves little, *see Weinberg v. Mendelow*, 113 A.D.3d 485, 486 (2014) ("[E]ven the sole owner of a corporation is entitled to the presumption that he is separate from his corporation.").

Second, Plaintiff alleges that REDACTED's conduct constitutes a lack of respect for corporate formalities, per the first *Shantou* factor. *See* FAC ¶ 35. The allegations by which Plaintiff supports this argument, however, are too limited to infer complete domination. Plaintiff alleges that REDACTED personally received funds from Plaintiff's students, at times directing students to make checks payable directly to her rather than the Studio. *Id.* While this indicates a lack of respect for corporate formalities, standing alone it is not adequate to raise a plausible inference that the Studio was a "mere instrumentality" of REDACTED, *Shantou*, 401 F. Supp. 3d at 444, especially considering the limited scope of Plaintiff's allegations. Plaintiff points to just two students, out of approximately 690, who directed their tuition checks to REDACTED personally. FAC ¶ 35. Plaintiff asserts, on information and belief, that more of these

[1] "[W]here a veil-piercing claim is based on allegations of fraud," Federal Rule of Civil Procedure 9(b) imposes a heightened pleading standard. *EED Holdings v. Palmer Johnson Acquisition Corp.*, 228 F.R.D. 508, 512 (S.D.N.Y. 2005). In this case, however, Plaintiff has not asserted fraud, so her veil-piercing claim is subject to the more liberal pleading standard of Rule 8.

transactions exist, *id.*, but "when stating allegations based on information and belief, the plaintiff still bears the burden of alleging the facts upon which her or his belief is founded," *Worldwide Fun Ltd. v. Sanuk Enterprises, Inc.*, No. 17-CV-3418, 2017 WL 11616418, at *5 (S.D.N.Y. Oct. 30, 2017) (cleaned up). Plaintiff has failed to allege such facts. Thus, the allegations amount to a limited and isolated use of corporate funds; that is not enough to satisfy the "complete domination" standard. *See, e.g., id.* ("[T]he allegation that Chirico took a single personal trip that was not paid for falls far short of showing total domination over the corporation.").

Plaintiff argues that Defendants' failure to file a biennial statement also constitutes neglect of corporate formalities, Pl. Mem., Dkt. 38 at 7, but this allegation is also inadequate to give rise to an inference of complete domination, *Ferreira v. Unirubio Music Publ'g*, No. 02-CV-805, 2002 WL 1303112, at *2 (S.D.N.Y. June 13, 2002) ("[F]ailure to file a biennial statement is not a rare occurrence, and we will not find that such a failure amounts to a lack of corporate formalities . . . ").

The FAC is silent with regard to any other factors indicating complete domination, such as inadequate capitalization, common office space, and degree of discretion. A comparison of the allegations in the FAC to allegations in other cases demonstrates the myriad deficiencies in the FAC. *See, e.g., Thrift Drug, Inc. v. Universal Prescription Adm'rs,* 131 F.3d 95, 97–98 (2d Cir. 1997) (finding complete domination where defendant's corporation never held shareholders' meetings, defendant was the sole shareholder and could locate no records of stock issued to him, corporation was inadequately capitalized, corporate funds were lent to defendant without any clear corporate purpose); *Mars Elecs. of N.Y., Inc. v. U.S.A. Direct, Inc.*, 28 F. Supp. 2d 91, 98 (E.D.N.Y. 1998), *aff'd sub nom. Mars Elecs. of N.Y., Inc. v. Put*, 242 F.3d 366 (2d Cir. 2000) (finding complete domination where defendant was the sole shareholder, commingled business

and personal funds in his personal checking account, took money out of the corporation at will, left the corporation undercapitalized, maintained no corporate formalities, and ran the corporation out of his house). In sum, Plaintiff's conclusory allegations of domination fail to satisfy the requisite pleading standard. Because these deficiencies were identified by Defendants in response to the initial complaint in this case, *see* Def. First Mem., Dkt. 23 at 6–8, the Court should conclude that granting leave to amend again as to piercing the corporate veil would be futile.

A. Even Assuming Complete Domination, Plaintiff's "Fraud or Wrong" Allegations are Conclusory

Even if Plaintiff were able to allege adequately that REDACTED exercised complete domination over the Studio, Plaintiff's factual allegations do not support a reasonable inference that REDACTED "abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice" against Plaintiff. *Shantou*, 401 F. Supp. 3d at 444.

Plaintiff alleges that REDACTED "used her complete control over the Studio to benefit herself personally at the expense of the Studio and REDACTED by, among other things, taking funds from the Studio which are owed to REDACTED." FAC ¶ 36. Although Plaintiff refers specifically only to three such payments, *id.* ¶ 35, Plaintiff's total share of those payments, according to Plaintiff's understanding of the Agreement, *see id.* ¶ 14, would have constituted roughly $40,000.

Defendants argue that there is no allegation in the FAC that REDACTED *pocketed* the tuition payments, as opposed to receiving them personally on behalf of the Studio as a response to exigencies presented by the COVID-19 pandemic. Def. Reply, Dkt. 42 at 2–3. In fact, the FAC alleges just that, *see* FAC ¶ 36 ("Plaintiff used her complete control over the Studio to

benefit herself personally . . . by . . . taking funds from the Studio . . . ."), albeit in an entirely conclusory manner. Although the Court is required to draw all reasonable inferences in the light most favorable to the plaintiff, *see Gibbons*, 703 F.3d at 599, it is "not bound to accept as true a legal conclusion couched as a factual allegation . . . ." *Twombly*, 550 U.S. at 555 (citation omitted). The allegation that REDACTED used her "complete control" over the Studio to benefit personally from funds sent to her for the Studio need not be credited.

Plaintiff further argues that REDACTED's personal receipt of tuition funds has rendered the Studio insolvent and that it is thus in no "position to pay the damages owed to Plaintiff." FAC ¶ 37. Even drawing all reasonable inferences in Plaintiff's favor, this allegation is simply too conclusory. In support of her assertion, Plaintiff points exclusively to unspecified "statements made by Defendants' counsel, the suspension of the Studio's activities for an extended period of time, and the non-functioning of the Studio's website." *Id.* ¶ 37. It is not reasonable to infer from these limited allegations that the Studio is insolvent. Nor is it reasonable to infer that any insolvency was caused by REDACTED's allegedly pilfering payments due to the Studio.

Because granting Plaintiff leave to amend her pleadings again to bolster the allegations necessary for the "fraud or wrong" veil-piercing prong would be futile, the Court should grant Defendants' motion to dismiss with prejudice insofar as it applies Count I against REDACTED. *See 24 Seven, LLC*, 2021 WL 276654, at *11.

III. Plaintiff's Implied Covenant and Unjust Enrichment Claims, as Written, Are Duplicative

Defendants argue that Plaintiff's implied covenant and unjust enrichment claims, in Counts II and III, respectively, are duplicative of her breach of contract claim in Count I. *See* Def. Mem. at 20–21.

Implied covenant claims are only permissible when they do not duplicate an existing breach of contract claim. *See, e.g.*, *Transcience Corp. v. Big Time Toys, LLC*, 50 F. Supp. 3d 441, 451–52 (S.D.N.Y. 2014) ("New York law does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based on the same facts, is also pleaded."). Such claims are duplicative when they are based on "'the same allegations' and seek 'the same damages'" as a breach of contract claim. *Hermant Patel M.D., P.C. v. Bandikatla*, No. 18-CV-10227, 2019 WL 6619344, at *3 (S.D.N.Y. Dec. 5, 2019) (citation omitted).

The same aversion to redundancy motivates New York courts' unjust enrichment jurisprudence. "Under New York law, a plaintiff may not recover under quasi-contract claims such as unjust enrichment where an enforceable contract governs the same subject matter." *Goldberg v. Pace Univ.*, 535 F. Supp. 3d 180, 198 (S.D.N.Y. 2021). This is most often the case when there is an existing written contract whose scope fully governs the dispute between the parties. *See, e.g., Clark–Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 387 (1987) ("[A] 'quasi contract' only applies in the absence of an express agreement . . . ."). Like implied covenant claims, unjust enrichment claims are duplicative when "based on the same allegations and seek[ing] the same damages as [a] breach of contract claim . . . ." *Ullmann-Schneider v. Lacher & Lovell-Taylor, P.C.*, 121 A.D.3d 415, 416 (2014).

Conversely, "the limitation of pleading claims sounding in quasi-contract does not apply when the written agreement . . . does not cover the full scope of the dispute between the parties .

. . ." *Gemma Power Sys., LLC v. Exelon W. Medway II, LLC*, No. 19-CV-00705, 2019 WL 3162088, at *5 (S.D.N.Y. July 1, 2019). Similarly, "when there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract . . . ." *Goldman v. Simon Prop. Grp., Inc.*, 58 A.D.3d 208, 220 (2008).

Plaintiff first responds by pointing to "the indefiniteness of some of the terms of the parties' written agreement," FAC ¶ 4, as a basis for disputing the Agreement's existence or application, therefore justifying proceeding on a quasi-contract theory, *see* Pl. Opp. at 12. This is unpersuasive. While the Agreement certainly contains "profound ambiguities," *id.*, including, for example, the failure to specify the payment due to Plaintiff from the Master Teacher Certification program, *see* REDACTED Decl., Ex. 2, Plaintiff has nevertheless failed to allege facts from which the Court could infer there is any doubt about the contract's existence or applicability. Defendants do not deny the existence of the Agreement, and Plaintiff does not allege that the Agreement was meant to apply only to non-RRT activities. Thus, as to activities covered by the Agreement, Plaintiff's implied covenant and unjust enrichment claims are duplicative of her breach of contract claim.

Services that were "in addition to the Agreement," FAC ¶ 44, could provide the basis for quasi-contract or implied contract claims. As Plaintiff notes, "many of the activities [she] provided for [Defendants] fall outside the terms of the written agreement . . . ." *Id.* ¶ 4. The Agreement, for example, does not mention the video series that Plaintiff "filmed, wrote, and performed in," *id.* ¶ 24, and that the Studio sold on its website and offered through mail and streaming, *id.* ¶ 25. Because the video series falls outside the scope of the written agreement,

Plaintiff has alleged sufficient facts to support plausibly the existence of a quasi-contract or implied contract claim. *See Gemma Power Sys., LLC*, 2019 WL 3162088, at *5.

Whether Plaintiff has adequately stated that claim is another matter. As currently written, Counts II and III are vague, confusing, conclusory, and duplicative. *See* FAC ¶¶ 39–56. Plaintiff's unjust enrichment claim in Count III — a claim typically sounding in quasi-contract — makes no reference to the video series and instead argues solely that "it would be unequitable and against good conscience for the Studio and REDACTED not to compensate REDACTED commensurate with her and [*sic*] efforts." *Id.* ¶ 56. This is duplicative of Count I to the extent it intends to include services Plaintiff provided pursuant to the Agreement. Additionally, although Plaintiff's implied covenant claim refers to "implied agreements," *id*. ¶ 48, she fails to articulate any allegations or damages that would distinguish her implied covenant claim from her breach of contract claim. *See Hermant Patel M.D., P.C*, 2019 WL 6619344, at *3 (dismissing a complaint's claims for breach of implied covenant of good faith and fair dealing as duplicative of a breach of contract claim). As written, these claims are confusing and do not constitute a short plain statement of the claims showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). The Court should therefore grant the motion to dismiss, but because amendment would not be futile, *see 24 Seven, LLC*, 2021 WL 276654 at *11, the Court should grant Plaintiff leave to amend her complaint to remedy these deficiencies — though any Second Amended Complaint should clearly separate the factual basis for her claim of breach of contract based on non-payment for services specified in the Agreement from the factual basis for her quasi-contract or implied contract claims based on non-payment of services that were not covered by the Agreement.

Because the existence of an implied contract regarding services not covered by the Agreement has not been firmly established, Plaintiff should be permitted to plead unjust enrichment and implied contract claims in the alternative insofar as they refer to those services. *See Transcience Corp.*, 50 F. Supp. 3d at 452 ("[E]ven though Plaintiffs may not ultimately recover under both the breach of contract and unjust enrichment claims, courts in this Circuit routinely allow plaintiffs to *plead* such claims in the alternative." (emphasis in original)) (collecting cases); *see also* Fed. R. Civ. P. 8(d)(2). To the extent that Plaintiff's implied covenant and unjust enrichment claims cover services called for by the Agreement, they are duplicative of the breach of contract claim and should be dismissed with prejudice.

IV. Plaintiff Has Failed to State a Claim for Defamation

To allege defamation under New York law, a plaintiff must allege a defamatory statement of fact concerning the plaintiff, publication to a third party, fault (either negligence or actual malice, depending on the status of the plaintiff), falsity, and either special damages or *per se* actionability. *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 1673, 176 (2d Cir. 2000). For a limited-purpose public figure — one who "voluntarily injects himself or is drawn into a particular public controversy," *BYD Co. Ltd. v. VICE Media LLC*, 531 F. Supp. 3d 810, 819 (S.D.N.Y. 2021) (citation omitted), *aff'd*, No. 21-1097, 2022 WL 598973 (2d Cir. Mar. 1, 2022) — the plaintiff must allege that the defamatory statement was made with "actual malice," *i.e.*, "with knowledge that [the statement] was false or with reckless disregard of whether it was false or not," *id.* at 822 (cleaned up). A defamation claim must also be made with adequate specificity to "afford [the] defendant sufficient notice of the communications complained of to enable him to defend himself." *Conti v. Doe*, No. 17-CV-9268, 2019 WL 952281, at *8 (S.D.N.Y. Feb. 27,

2019) (citation omitted). "Specifically, a complaint must 'identify the allegedly defamatory statements, the person who made the statements, the time when the statements were made, and the third parties to whom the statements were published.'" *Id.* (citation omitted).

Because Plaintiff has not alleged special damages, the defamation must constitute defamation *per se*. As is relevant here, a statement is defamatory *per se* if it "tends to disparage a person in the way of his office, profession, or trade." *Celle*, 209 F.3d at 179; *Nichols v. Item Publishers*, 309 N.Y. 596, 600–01 (1956) (noting the general rule that a statement is defamatory *per se* "if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number in the community, even though it may impute no moral turpitude to him") (quoting *Mencher v. Chesley*, 297 N.Y. 94, 100 (1947)).

Plaintiff alleges that she has suffered injury in her "trade, business, or profession." *Liberman v. Gelstein*, 80 N.Y.2d 429, 435 (1992) (citations omitted); *see also* FAC ¶ 33. For a statement to "tend to injure another in his or her trade, business, or profession," a "general reflection upon the plaintiff's character or qualities" is insufficient. *Liberman*, 80 N.Y.2d at 436. Instead, a statement must be "limited to defamation of a kind incompatible with the proper conduct of the business, trade, profession or office itself. The statement must be made with reference to a matter of significance and importance for that purpose . . . ." *Id.* (citation omitted). Further, the statement must be "targeted at the specific standards of performance" relevant to the plaintiff's business, *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 813 F. Supp. 2d 489, 550 (S.D.N.Y. 2011), which will often implicate the Plaintiff's ability to perform their profession, *see, e.g.*, *Aronson*, 65 N.Y.2d at 594 ("[W]hether or not a plaintiff fails to hand in time sheets or is neglectful is no reflection upon her performance as a linguist or her ability to be a good writer or researcher." (quotations omitted)). Finally, "'[w]here a statement impugns

the basic integrity or creditworthiness of a business, an action for defamation lies and injury is conclusively presumed.'" *Celle,* 209 F.3d at 180 (citing *Ruder & Finn Inc. v. Seaboard Surety Co.*, 52 N.Y.2d 663 (1981)).

A. REDACTED's Allegedly Defamatory Statements: Overview

Plaintiff's defamation claim refers to three separate statements allegedly made by REDACTED: (i) that "REDACTED received all of the tuition paid by the students for her courses, except for a modest 'room fee' which was retained by the Studio," FAC ¶ 29, which Plaintiff alleges was REDACTED's attempt to deflect blame away from herself as students "clamor[ed] for a refund of their $29,000 tuition," *id.*; (ii) that Plaintiff had been "paid hundreds of thousands of dollars in 2019," whereas, according to Plaintiff, she had been paid nothing for her RRT courses that year, *id.* ¶ 32; and (iii) "that the inadequate ventilation and sweltering conditions in the Studio was [*sic*] the result of REDACTED's insistence on a quiet environment in which to teach," *id.* ¶ 33. Defendants' motion should be granted as to each of these claims, but to the extent that Plaintiff can provide adequate specificity and allege further facts to support the third statement, she should be given leave to amend as to the first and third statements.

1. REDACTED's Alleged Statement that Plaintiff Received All Tuition Except for a Modest "Room Fee" Arguably Impugns Plaintiff's Basic Integrity

Plaintiff argues that REDACTED's statements regarding Plaintiff's receipt of tuition payments damaged Plaintiff's "reputation for honesty and integrity," *id.* ¶ 28; Defendants respond that honesty and integrity are not "necessary requirements for a voice teacher," Def. Mem. at 13. This colloquy misses the point. To state a claim for defamation *per se*, Plaintiff must allege statements that impugn the "basic integrity or creditworthiness" of Plaintiff's business. *Celle*, 209 F.3d at 180. In context, the statement might reasonably be interpreted to be

doing just that. Made after Plaintiff had refused to provide further services, and when students were "clamoring for a refund," FAC ¶ 29, REDACTED's statement implies that Plaintiff received the students' money and nevertheless refused to teach. At least at this stage, this statement "can reasonably be understood to impute a dishonest character to plaintiff's business activities that goes beyond a mere failure to live up to expectations." *Ives v. Guilford Mills, Inc.*, 3 F. Supp. 2d 191, 200 (N.D.N.Y. 1998).

2. REDACTED's Alleged Statement that Plaintiff had been Paid "Hundreds of Thousands of Dollars in 2019" is True

The second allegedly defamatory statement is that Plaintiff had been paid "hundreds of thousands of dollars in 2019." FAC ¶ 32. Based on other allegations in the FAC, one would not be able to infer that this statement is false, let alone defamatory. According to the FAC, Plaintiff had been paid, albeit sporadically, $220,000 for non-RRT activities since 2018. *Id.* ¶ 27.

3. REDACTED's Alleged Statement Attributing Inadequate Ventilation to Plaintiff's Teaching Style Arguably Injures Plaintiff in Her Profession

Defendants argue that REDACTED's statement assigning fault for the "inadequate ventilation and sweltering conditions in the Studio" to "REDACTED's insistence on a quiet environment to teach," FAC ¶ 33, does not injure Plaintiff in her profession, as "concern for the health and welfare of her students" is not an element of one's work as a voice coach, Def. Mem. at 15. This argument is unpersuasive. While concern for the health of one's students may not be a formal requirement of voice coaching, in practice it is essential to ensuring a productive teaching environment, a "matter of significance and importance" for any voice coach. *Liberman*, 80 N.Y.2D at 436. Indeed, securing the safety of others to whom one has an obligation is essential to most professions. *See, e.g.*, *Dollar Tree Stores, Inc. v. Serraty*, No. 16-CV-6818, 2018 WL 1180165, at *12 (E.D.N.Y. Feb. 14, 2018), *report and recommendation adopted*, No.

16-CV-6818, 2018 WL 1175159 (E.D.N.Y. Mar. 6, 2018) (holding that the statement that plaintiffs "put their associates at risk in order to sell things for a dollar" constituted defamation *per se*).

Defendants respond that the statement could just as easily "attribute to Plaintiff an unwavering attention to perfection," Def. Mem. at 15, but on a motion to dismiss, all reasonable inferences must be drawn in the non-movant's favor. *See Gibbons*, 703 F.3d at 599. The Court is thus under no obligation to accept Defendants' alternative view of REDACTED's alleged statement.

B. Plaintiff's Defamation Pleading Lacks Specificity

With respect to all three of the allegedly defamatory statements, Defendants convincingly argue that Plaintiff has failed to plead defamation with adequate specificity. Def. Mem. at 18. Plaintiff has provided neither the times these statements were made nor the third parties to whom they were communicated. Plaintiff does not seriously contest these deficiencies, instead asking that she be granted leave to file a Second Amended Complaint to address them. Pl. Opp. at 10 n.6. Except for the statement that Plaintiff was paid hundreds of thousands of dollars in 2019, Plaintiff should be granted leave to amend her claim of defamation to add required specifics.

C. Plaintiff Has Adequately Alleged Facts From Which to Infer Actual Malice

Defendants further argue that Plaintiff, who "does not dispute that she is a public figure," Pl. Opp. at 11, has failed to allege adequately that REDACTED acted with actual malice, Def. Mem. at 19–20. This argument fails. "Although actual malice is subjective, a "court typically will infer actual malice from objective facts." *Celle*, 209 F.3d 163, 183 (citation omitted). In this case, Plaintiff has adequately alleged objective facts from which the Court could infer actual malice. One might reasonably infer that, as sole owner and principal of the Studio, FAC ¶ 3,

REDACTED was familiar with the conditions in the studio and the manner in which Plaintiff was (or was not) paid. With respect to the statement that Plaintiff received all of the students' tuition other than a small room fee, the FAC adequately alleges that REDACTED personally received funds that should have gone to Plaintiff. *Id.* ¶ 36. The Court must assume that fact is true. If so, it can also easily infer that she knew her statement about Plaintiff's receipt of all tuition payments was false. The statement regarding the heat and inadequate ventilation is more problematic. In any amended complaint, Plaintiff should include facts from which the Court can reasonably infer that REDACTED knew that the conditions in the studio were not the result of any requirements of the Plaintiff regarding noise levels.

Applicant Details

First Name	**Zachary**
Last Name	**Damir**
Citizenship Status	**U. S. Citizen**
Email Address	**zdamir@nd.edu**
Address	**Address** **Street** **54746 Twyckenham Dr. #3215** **City** **South Bend** **State/Territory** **Indiana** **Zip** **46637** **Country** **United States**
Contact Phone Number	**6266227355**

Applicant Education

BA/BS From	**California Lutheran University**
Date of BA/BS	**December 2019**
JD/LLB From	**Notre Dame Law School** **http://law.nd.edu**
Date of JD/LLB	**May 19, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Notre Dame Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Notre Dame Moot Court Board, Seventh Circuit Team**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Waddilove, David
dwaddilo@nd.edu
Pojanowski, Jeffrey
Pojanowski@nd.edu
Kelley, William
William.K.Kelley@nd.edu
574-631-8646

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Zachary A. Damir

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South Bend, IN 46637

(626) 622-7355
zdamir@nd.edu

May 24, 2023

The Honorable Juan R. Sánchez
United States District Court for the Eastern District of Pennsylvania
14613 U.S. Courthouse, 601 Market Street
Philadelphia, PA 19106

Dear Chief Judge Sánchez,

I am a second-year student at Notre Dame Law School. I am writing to apply for a clerkship in your chambers beginning in 2024.

Enclosed is my resume, law school and undergraduate transcripts, and writing sample. You will also receive letters of recommendation from the following people. They would be welcome to discuss my candidacy with you.

Dr. David P. Waddilove
Notre Dame Law School
dwaddilo@nd.edu
(734) 277-3194

Prof. Jeffrey A. Pojanowski
Notre Dame Law School
Pojanowski@nd.edu
(574) 631-8078

Prof. William K. Kelley
Notre Dame Law School
wkelley@nd.edu
(574) 631-8646

If I can provide additional information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,

Zachary A. Damir

Zachary A. Damir

(626) 622-7355 • zdamir@nd.edu
54746 Twyckenham Dr. #3215 South Bend, IN 46637

EDUCATION

University of Notre Dame Law School — Notre Dame, IN
Juris Doctor Candidate — May 2024
Current GPA: 3.513

- *Notre Dame Law Review*, Executive Articles Editor, Vol. 99
- Notre Dame Moot Court Seventh Circuit Team, Brief Writer and Oralist
- Notre Dame Federalist Society, Vice President
- Teaching Assistant for Property Professor D. P. Waddilove (Spring 2023)
- Faculty Award for Excellence in Natural Resources
- Galilee Public Interest Immersion Course

California Lutheran University — Thousand Oaks, CA
Bachelor of Arts in Political Science, Departmental Honors, summa cum laude — May 2020
Final GPA: 3.91

- Study Abroad: Balliol College, University of Oxford (Fall 2018)
- Political Science Department, Independent Researcher (January – December 2019)
- Debate Team, Captain; Model United Nations

EXPERIENCE

Institute for Justice (IJ) — Seattle, WA
Dave Kennedy Fellowship — May 2023 – August 2023

- Writes legal memos and briefs about constitutional challenges to state and federal regulations or laws on short deadlines before discussing related litigation with IJ attorneys
- Attends and participates in litigation, legal theory, and media workshops and roundtables with IJ specialists
- Contributes to litigation strategy in free speech, economic liberty, educational liberty, and property related cases

University of Notre Dame Law School — South Bend, IN and Virtual
Research Assistant for Professor D.P. Waddilove — May – August 2022

- Read, summarized, critiqued, and discussed cases and scholarly research related to private law and theory
- Edited Prof. Waddilove's writing to synthesize the best possible arguments for his publications
- Crafted academic and legal narratives concerning private law jurisprudence from Prof. Waddilove's research
- Drafted sections of law review articles, one about a new theory of property law and the other about contracts breached during the pandemic, incorporating feedback to create a final product that is ready for circulation

American Enterprise Institute — Washington, D.C.
Government Relations Intern — May – August 2019

- Attended and prepared for Congressional hearings, offered support and political analysis to testifying AEI persons
- Wrote newsletters, memoranda, and summaries of AEI publications and events, used in Congressional mailings
- Worked to plan and present interviews, panels, and networking events involving national officials to the audience
- Completed projects for staff on socioeconomic and foreign policy issues to be used for communications to Congress

Office of then-Majority Leader Kevin McCarthy — Washington, D.C.
Intern—House Leadership Office — January – April 2018

- Drafted and complied memos, policy papers, and interoffice correspondence for the Congressman and his staff
- Researched legislative history and public records to advise staff about members' dispositions before official voting
- Directed U.S. Capitol tours, concisely speaking to large groups, maintaining a friendly and professional appearance

INTERESTS

Neapolitana pizza, Watching bad television shows, European travel, Cello and orchestral music, Cathedral architecture

How to Authenticate This Official Transcript

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UNIVERSITY OF NOTRE DAME NOTRE DAME, INDIANA 46556

Damir, Zachary A.
Student ID: XXXXX8462

Date Issued: 01-JUN-2023
Page: 1

Birth Date: 08-16-XXXX

Issued To: Zachary Damir
Parchment DocumentID: TWB5J4RJ
zdamir@nd.edu

Course Level: Law
Program: Juris Doctor
College: Law School
Major: Law

CRSE ID	COURSE TITLE	CRS HRS	GRD	QPTS	UND SEMESTER TOTALS ATTEMP HRS	EARNED HRS	GPA HRS	GPA	OVERALL TOTALS ATTEMP HRS	EARNED HRS	GPA HRS	GPA
UNIVERSITY OF NOTRE DAME CREDIT:												
Fall Semester 2021												
Law School												
LAW 60105	Contracts	4.000	B	12.000								
LAW 60302	Criminal Law	4.000	B	12.000								
LAW 60703	Legal Research	1.000	B+	3.333								
LAW 60705	Legal Writing I	2.000	A-	7.334								
LAW 60901	Torts	4.000	B+	13.332								
		Total		47.999	15.000	15.000	15.000	3.200	15.000	15.000	15.000	3.200
Spring Semester 2022												
Law School												
LAW 60307	Constitutional Law	4.000	B+	13.332								
LAW 60308	Civil Procedure	4.000	B+	13.332								
LAW 60707	Legal Resrch & Writing II-MC	1.000	A-	3.667								
LAW 60906	Property	4.000	B+	13.332								
LAW 70318	Legislation & Regulation	3.000	A	12.000								
LAW 75700	Galilee	1.000	S	0.000								
		Total		55.663	17.000	17.000	16.000	3.479	32.000	32.000	31.000	3.344
Fall Semester 2022												
Law School												
LAW 70137	Trademark & Unfair Comp	3.000	A-	11.001								
LAW 70315	Administrative Law	3.000	B+	9.999								
LAW 73204	Private Law Workshop	2.000	A	8.000								

CONTINUED ON PAGE 2

UNIVERSITY OF NOTRE DAME NOTRE DAME, INDIANA 46556

Damir, Zachary A.
Student ID: XXXXX8462

Birth Date: 08-16-XXXX

Date Issued: 01-JUN-2023
Page: 2

CRSE ID	COURSE TITLE	CRS HRS	GRD	QPTS	UND SEMESTER TOTALS ATTEMP HRS	EARNED HRS	GPA HRS	GPA	OVERALL TOTALS ATTEMP HRS	EARNED HRS	GPA HRS	GPA
University of Notre Dame Information continued:												
LAW 75710	Intensive Trial Ad	4.000	S	0.000								
LAW 75743	Moot Court Appellate	1.000	S	0.000								
LAW 75749	Law Review	1.000	S	0.000								
		Total		29.000	14.000	14.000	8.000	3.625	46.000	46.000	39.000	3.402
Spring Semester 2023												
Law School												
LAW 70305	Constitutional Law II	3.000	B+	9.999								
LAW 70350	Natural Resources Law	3.000	A	12.000								
LAW 70457	Rule of Law Seminar	2.000	A	8.000								
LAW 70841	History of the Common Law	3.000	A	12.000								
LAW 75743	Moot Court Appellate	1.000	S	0.000								
LAW 75749	Law Review	1.000	S	0.000								
LAW 76101	Directed Readings	2.000	A	8.000								
		Total		49.999	15.000	15.000	13.000	3.846	61.000	61.000	52.000	3.513
Fall Semester 2023												
IN PROGRESS WORK												
LAW 70201 M	Evidence	3.000	IN PROGRESS									
LAW 70312 M	Suing the Federal Government	3.000	IN PROGRESS									
LAW 70371 M	Conflict of Laws	3.000	IN PROGRESS									
LAW 70468 M	Post-Conviction Remedies	2.000	IN PROGRESS									
LAW 70736 M	Public Interest Externship	1.000	IN PROGRESS									
LAW 70808 M	Legal Ethics: Prof. R Examined	3.000	IN PROGRESS									
LAW 75737 M	Seventh Circuit Pract Ext FW	2.000	IN PROGRESS									
	In Progress Credits 17.000											

********** TRANSCRIPT TOTALS **********

NOTRE DAME	Ehrs:	61.000	QPts:	182.661
	GPA-Hrs:	52.000	GPA:	3.513
TRANSFER	Ehrs:	0.000	QPts:	0.000
	GPA-Hrs:	0.000	GPA:	0.000
OVERALL	Ehrs:	61.000	QPts:	182.661
	GPA-Hrs:	52.000	GPA:	3.513

********** END OF TRANSCRIPT **********

CAMPUS CODES

All courses taught at an off campus location will have a campus code listed before the course title.
The most frequently used codes are:

AF Angers, France
DC Washington, DC
FA Fremantle, Australia
IA Innsbruck, Austria
IR Dublin, Ireland
LA London, England (Fall/Spring)
LE London, England (Law-JD)
LG London, England (Summer EG)
LS London, England (Summer AL)
PA Perth, Australia
PM Puebla, Mexico
RE Rome, Italy
RI Rome, Italy (Architecture)
SC Santiago, Chile
SP Toledo, Spain

For a complete list of codes, please see the following website:
http://registrar.nd.edu/pdf/campuscodes.pdf

GRADING SYSTEM - SEMESTER CALENDAR

Previous grading systems as well as complete explanations are available at the following website:
http://registrar.nd.edu/students/gradefinal.php

August 1988 - Present

Letter Grade	Point Value	Legend
A	4	
A-	3.667	
B+	3.333	
B	3	
B-	2.667	
C+	2.333	
C	2	Lowest passing grade for graduate students.
C-	1.667	
D	1	Lowest passing grade for undergraduate students.
F	0	Failure
F*	0	No final grade reported for an individual student (Registrar assigned).
X	0	Given with the approval of the student's dean in extenuating circumstances beyond the control of the student. It reverts to "F" if not changed within 30 days after the beginning of the next semester in which the student is enrolled.
I	0	Incomplete (reserved for advanced students in advanced studies courses only). It is a temporary and unacceptable grade indicating a failure to complete work in a course. The course work must be completed and the "I" changed according to the appropriate Academic Code.
U		Unsatisfactory work (courses without semester credit hours, as well as research courses, departmental seminars or colloquia or directed studies; workshops; field education and skill courses).

Grades which are not Included in the Computation of the Average

S Satisfactory work (courses without semester credit hours, as well as research courses, departmental seminars or colloquia or directed studies; workshops; field education and skill courses).
V Auditor (Graduate students only).
W Discontinued with permission. To secure a "W" the student must have the authorization of the dean.
P Pass in a course taken on a pass-fail basis.
NR Not reported. Final grade(s) not reported by the instructor due to extenuating circumstances.
NC No credit in a course taken on a pass-no credit basis.

For current and historical grade point averages by class, as well as additional information regarding prior grading policies and current distribution ranges, see: http://registrar.nd.edu/students/gradefinal.php

THE LAW SCHOOL GRADING SYSTEM

The current grading system for the law school is as follows: A (4.000), A- (3.667), B+ (3.333), B (3.000), B- (2.667), C+ (2.333), C (2.000), C- (1.667), D (1.000), F or U (0.000).

Effective academic year 2011-2012, the law school implemented a grade normalization policy, with mandatory mean ranges (for any course with 10 or more students) and mandatory distribution ranges (for any course with 25 or more students). For Legal Writing (I & II) only, the mean requirement will apply but the distribution requirement will not apply. The mean ranges are as follows: for all first-year courses (except for the first-year elective, which is treated as an upper-level course), the mean is 3.25 to 3.30; for large upper-level courses (25 or more students), the mean is 3.25 to 3.35; for small upper-level courses (10-24 students), the mean is 3.15 to 3.45.

For current and historical grade point averages by class, as well as additional information regarding prior grading policies and current distribution ranges, see: http://registrar.nd.edu/students/gradefinal.php

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CHUCK HURLEY, UNIVERSITY REGISTRAR

In accordance with USC 438 (6) (4) (8) (The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without the written consent of the student. Alteration of this transcript may be a criminal offense.

COURSE NUMBERING SYSTEM

Previous course numbering systems (prior to Summer 2005) are available at the following website:
http://registrar.nd.edu/faculty/course_numbering.php

Beginning in Summer 2005, all courses offered are five numeric digits long (e.g. ENGL 43715).
The first digit of the course number indicates the level of the course.

ENGL 0 X - XXX = Pre-College course
ENGL 1 X - XXX = Freshman Level course
ENGL 2 X - XXX = Sophomore Level course
ENGL 3 X - XXX = Junior Level course
ENGL 4 X - XXX = Senior Level course
ENGL 5 X - XXX = 5th Year Senior / Advanced Undergraduate Course
ENGL 6 X - XXX = 1st Year Graduate Level Course
ENGL 7 X - XXX = 2nd Year Graduate Level Course (MBA / LAW)
ENGL 8 X - XXX = 3rd Year Graduate Level Course (MBA / LAW)
ENGL 9 X - XXX = Upper Level Graduate Level Course

David P. Waddilove, J.D., Ph.D.
University of Notre Dame Law School
1100 Eck Hall of Law
Notre Dame, IN 46556

June 05, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Zach first stood out in Property. In fact, I believe that he was the first student I truly noticed in his year. In the midst of this large 1L class, here was a student with a striking analytical capacity and principled consistency. He became my go-to to illustrate a vitally important concept of law: precedent. Zach's appreciation for what the law requires respecting authority made him a splendid interlocutor. The key was Zach's competence in principled reasoning – something I consider perhaps the greatest characteristic of a lawyer, which made him, from the beginning, illustrative of how to do law well.

This led me to offer Zach a position as my research assistant for the following summer. I didn't need Zach to apply; I just offered on the basis of what I'd observed. He proved to be a diligent and effective researcher, summarizing much of the vast over-supply of academic literature that I needed to consider, arranging outlines of topics, and drafting first cuts at sections for various articles. One of Zach's particular strengths, it turns out, is writing. He has an entertaining but learned and clear style that conveys information effectively and effortlessly. This is, I suspect, one of the things that you will find most useful about him as a clerk. And let me assure you as a teacher that writing ability is in increasingly short supply. So to find a potential clerk of Zach's strengths in this realm is something to be seized. Combined with his research skills, as exemplified in the rest of the work he did for me, I know that you will have an ideal clerk.

It has taken a bit of time for Zach's strengths to coalesce into good grades in law school, but that should not put you off. It is not uncommon for students of real ability to require time to transition to the peculiarities of the law school system. This is no reflection of capacities or future potential. In fact, some of the best lawyers and clerks are those with special strengths in research and writing, which I have observed to have a relatively poor correlation with test-taking skills. Yet exams are the near-exclusive basis of law school grades. So Zach's early grades are best discounted. The better indication of his abilities is the trend in his grades. This is unambiguous. Each semester he has improved and is now getting very good grades. I expect the trend to continue.

The only possible interruption in Zach's GPA progress could come from his non-class work. The first part of that is with the Notre Dame Law Review. Having successfully "written on" to the law review, as is fitting for his skill set, he narrowly failed to be editor-in-chief. Instead, he has become the head of articles, no small position. Indeed, article selection is now ultimately his responsibility, a daunting task even as I consider it. Zach has come to me seeking advice on article selection, and I know that he is taking his job extremely seriously. This is Zach's modus operandi, to work hard at the job in front of him, seriously and diligently, in an exemplary fashion. I'm sure you'll find that in your chambers as well, to the benefit of your judicial endeavors. The second part is my fault, as I asked Zach, given his excellent research assistance on property topics, following his excellent performance in Property class (his grade was just the final exam, which I take cum grano salis), to serve as a teaching assistant for me in Property for the spring 2023 semester. Again, he approached this task with verve, much to the benefit of my other students, and I hope not to his own detriment. Either way, these activities and his approach to them demonstrate what will make Zach a superb clerk.

Finally, you'll find that Zach is a splendid person who is always a pleasure to interact with and discuss things with. He has a pleasant personality, a dry wit, and a quick mind that makes him a delight to be around. I know from my own clerking experience for Judge Morris Arnold of the Eight Circuit, now a friend of longstanding with whom I had a long telephone conversation, how helpful it is when personal affinity can accompany professional comity. I'm sure you'll have that with Zach.

In sum, it I my great pleasure to recommend Zachary Damir to you as a law clerk. You will do yourself a great service by hiring him.

Sincerely,

David P. Waddilove, J.D., Ph.D.
Associate Professor of Law
Notre Dame Law School

David Waddilove - dwaddilo@nd.edu

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am happy to write in strong support of my student Zachary Damir's application for a clerkship in your chambers. Zach is smart, well-read, intellectually curious, hardworking, and a high-character person who loves the law. Students of his caliber have succeeded at federal district court clerkships and I expect Zach to do the same. I recommend him without reservation.

I have gotten to know Zach in two capacities. First, he was in my torts class last fall. Second, I was assigned to mentor Zach as part of Notre Dame Law School's program for First Generation professional students. Both dimensions give me great confidence in his prospects.

First, Zach's legal abilities. I first want to discuss his torts grade and his broader academic performance so far. Zach "only" received a B+ on his blindly graded exam. We have a mandatory curve and distribution at Notre Dame Law School and I am told by others, including judges, that it is stricter than some of our peer and competitor institutions: the median exam must lie roughly at the border of B/B+. That said, I was surprised Zach only got a B+. In my discussions with him in class and office hours, he was very sharp. He immediately mastered the basics, quickly moved to more complicated, high-level concepts and doctrinal questions, and worked with them with great facility. I think the most likely explanation for his fine-but-not-stellar performance last year was that he was still learning how to translate his legal acumen to an in-class exam. Indeed, Zach's GPA has risen every semester. His current cumulative average of 3.4 qualifies him to graduate with cum laude honors and his 3.625 GPA this fall is magna cum laude-caliber. The fact that he was able to get on the Law Review by the force of his writing competition entry only solidifies this impression. Zach will bring substantial talent to your chambers.
Getting to know Zach as his First Generation mentor has also been a pleasure and makes me even more confident about his application. He is the first person in his family to go to professional school, so we have gotten together over coffee a number of times to talk about approaches to classes, summer jobs, and long-term career plans. I have truly enjoyed getting to know Zach and I am excited about his career. He has a passion for ideas both big and small—ranging from big picture questions of political and constitutional theory down to the nitty gritty of legal doctrine or regulatory policy. He is one of the few students I have met who is just as willing to talk about Tocqueville as he to dive into the technicalities of, say, telecommunications or energy rulemaking procedure. I can see Zach becoming a counselor to a commissioner at an independent agency or working at the solicitor's office at an agency before moving on to broader policy roles. Indeed, he is one of the few 2Ls I know this year who has shown no interest in law firm jobs and wants only to do public interest work this summer. That said, he also has a wide range of legal interests. I suspect he was appointed to run the Notre Dame Law Review articles committee because of his love of—and breadth of knowledge about—the law.

Zach's likely career trajectory toward public service and public affairs heartens me. He is eminently just the kind of person you want in government service. Zach is kind, humble, diligent, thoughtful, and quietly funny. Based on his interactions with the eight students my family hosted for Thanksgiving last fall, it's also clear that he plays well with others and has the respect of his peers. He will be great in chambers and in the courthouse: a faithful and diligent agent for his judge and a team player with his co-clerk(s).

Thank you for considering his application. If you have any questions or need to talk further, please contact me at pojanowski@nd.edu or 574.339.3624

Yours,

Jeffrey A. Pojanowski
Professor of Law
Notre Dame Law School

Notre Dame Law School
1100 Eck Hall of Law
Notre Dame, IN 46556

June 05, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing in support of Zachary Damir, a member of the class of 2024 at the Notre Dame Law School who has applied for a clerkship in your chambers.

Zach was my student last year in Legislation and Regulation. He wrote one of the best exams in the class, achieving one of a just a few A grades in a very strong group. Overall Zach's performance academic performance has been impressive. I have no doubt that he'll perform at a high level in any clerkship.

I've gotten to know Zach through several office hours visits and several meetings regarding his student note. I really like him. In all candor at first he comes across a bit awkwardly, and I didn't know what to think. But as I've gotten to know Zach I really have come to like him a lot. He's down to earth and funny, and really engaging and interesting in talking about law. His note on statutory parentheticals is terrific—it's a sophisticated treatment of a little-noticed topic and is actually very entertaining to read. His research is impressive and his prose is excellent. Indeed, Zach's note draft is one of the most interesting and unusual student papers I've read in years. I think it has real promise as an article.

I'm please to recommend Zach Damir very highly. He's a very impressive law student who will only become more impressive as he gets more comfortable in professional environments. He'll be fun to have around and will do really good work.

Please let me know if you'd like to talk further about Zach's candidacy.

Respectfully yours,

William K. Kelley

William Kelley - William.K.Kelley@nd.edu - 574-631-8646

Zachary A. Damir

Writing Sample

This writing sample is taken from a longer Note written for publication by the *Notre Dame Law Review*. It documents the purpose and permissibility of the use of punctuation marks to determine legislative intent. In particular, the Note focuses on parentheses, which have been a subject of debate in recent decisions.

There are two sections included in this writing sample. The first is the second half of a section introducing parentheses. This half discusses the use of those punctuation marks in the context of legal drafting. The second section included discusses the way the Supreme Court weighed words within parentheses that somehow contradict exterior words in a statute.

In a section not included, the Note concludes that adopting a new syntactic canon of construction that disfavors certain uses of parentheses would be wise.

A. PARENTHESES IN LEGAL DOCUMENTS

Parentheses offer an interesting challenge in the field of legal drafting. And their history departs from regular story of statutory punctuation. The early English statutes were held to include parenthetical marks in their original drafts.[1] As time went on, those statutes continued to have parentheses included in the original statute, or at least in the reprinted copies, used to demonstrate illustrations and exceptions.[2] This is especially interesting since parentheses were the exception to the general rule; while other marks were extremely uncommon, the parenthesis remained commonly used in the Statutes of the Realm.[3] As a discontented British lawyer, James Burrow, noted, "[T]o put one parenthesis within another is a great Fault in Language: But to *begin* a parenthesis *only*; and then (within that) to *begin another*; and never to end either; is much greater."[4] Burrow also noted, however, that the parenthesis "is of great Use and tends, in my apprehension, very much to perspicuity."[5] Burrow was right in noting both danger and usefulness in the mark.

Early American legal writers similarly used parentheses in the absence of other marks. Jefferson, for instance, wrote that statutes create confusion "from . . . parenthesis within parenthesis, and their multiplied efforts at certainty."[6] The use of parentheses in the long, unpunctuated statute was seen from the first days of the

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[1] *See* [*infra* section not included in this writing sample].
[2] *See, e.g.*, An Act for the Pacification between England and Scotland 1640, 16 Car. C. 17 §1 (Eng.) ("[W]hosoever shall be found upon trial and examination by the Estates of either of the two Parliaments (they judging against the persons subject to theire owne authority) to have been the authors and cause of the late and present troubles . . . ."); An Act Declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crowne 1688, 1 W. & M. c. 2 § 1 (Eng.) ("[E]very King and Queene of this Realme . . . at the time of his or her takeing the said Oath (which shall first happen) make subscribe and audibly repeate the Declaration mentioned in the Statute . . . .").
[3] *See, e.g.*, *supra* note [not included in this writing sample].
[4] JAMES BURROW, DE USU ET RATIONE INTERPUNGENDI: AN ESSAY ON THE USE OF POINTING 21–22 (1771).
[5] *Id.* at 22.
[6] DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 253 (1963) (quoting 1 THE WRITINGS OF THOMAS JEFFERSON 65 (Lipscomb, ed. 1905)).

American colonies[7] but diminished after the American Revolution to make way for the regular system of punctuation. Though not a statute, this is best seen in the Constitution's use of punctuation as illustrative or exemptive. For instance, Article II, Section 2 states that the President must "solemnly swear (or affirm)" his oath.[8] Parentheses were also used in early state statutes[9] and legislation from the First Congress,[10] which was liberal with its use of the marks.

Despite their historically common usage, however, the parenthesis recently became embroiled in the normal debate regarding statutory punctuation. This is not because the understanding of punctuation changed,[11] nor because parentheses became less useful.[12] Rather, it is due to their ability to confuse a reader. As Burrow said, it is wrong to omit the use of parentheses, but they might be inadvertently made to "obscure the sentence to which [they are] introduced."[13] Such effects run afoul of a key tenet of interpretation, creating tension between a textualist and originalist view of the parenthesis' role in statutes: if the history and traditional usage of the parenthesis advise its inclusion in a statute but textual clarity advises its exclusion, which viewpoint should govern?

When interpreting a statute, one must give effect "to all its provisions, so that no part will be inoperative or superfluous."[14] Provisions necessarily include

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[7] *See* THOMAS GATES KNIGHT, VA. CO. OF LONDON, ARTICLES, LAWS, AND ORDERS, DIVINE, POLITIC AND MARITAL FOR THE COLONY OF VIRGINIA (1612) ("[I]f hee die intestate, his goods shall bee put into the store, and being valued by two sufficient praisors, his next of kinne (according to the common Lawes of England)").

[8] U.S. CONST. art. II, § 1; *see also* U.S. CONST. art I, § 8 ("[Congress may] exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square)"). For an illustrative use, see U.S. CONST. art. IV, § 4 ("on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence").

[9] *See, e.g.*, 1787 N.Y. Laws 234 (using an illustrative parenthetical).

[10] *See, e.g.*, 1 Stat. 55 (1789); 1 Stat. 125 (1790); 1 Stat. 131 (1790). This is *far* from exhaustive.

[11] *See* David S. Yellin, *The Elements of Constitutional Style: A Comprehensive Analysis of Punctuation in the Constitution*, 79 TENN. L. REV. 687, 718 (2012) ("[T]he Framers used [parentheses] in ways that are both familiar to modem readers and easy to understand.").

[12] *See, e.g.*, Urban A. Lavery, *Punctuation in the Law*, 9 AM. BAR ASS'N J 225, 228 (1924) ("For the draftsman the parentheses are of great importance . . . .").

[13] BURROW, *supra* note 4, at 21–22.

[14] Corely v. United States, 556 U.S. 303, 314 (2009) (quoting Hibbs v. Winn, 542 U.S. 88, 101 (2004)).

punctuation and often include parentheses,[15] and such provisions should be clear to grant them their due effect. Yet punctuation has a relatively greater chance of being deemed a scrivener's error,[16] and since parentheses modify sentence structure and references, they contribute to "the biggest source of uncertainty of meaning" in statutes.[17] Thus, when the text is the primary lens of statutory interpretation, the broad use of parentheses presents a problem. Not all punctuating modifiers are equal, however, and some accounts suggest the superiority of the parenthesis in certain circumstances. For instance, one book points out that "[p]arentheses, though generally frowned upon, are sometimes more reliable than commas in setting off a phrase when there is possible uncertainty as to how the ideas that follow the phrase are linked to those that precede it."[18] It also discusses how parentheses create clearer demarcations of asides than other marks.[19] Some other guidebooks agree that parentheses may impart clarity,[20] and a Pennsylvania law even codifies that idea.[21]

But the majority of sources disagree. The common wisdom provides "a rule against parentheses" in statutes.[22] The reason supporting the rule is that "[h]ow the courts would treat a parenthetical phrase (as for example on a motion to construe a will), is purely speculative."[23] Instead, they suggest that such illustrations and exemptions be placed at the beginning or end of a sentence in a statute.[24] Moreover, prominent members of the legal community like Bryan A. Garner ascribe to the view that the words inside the parenthetical are less important to the overall meaning by

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[15] *See supra* notes [not included in this writing sample, describing statutes of the states and federal government].
[16] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 164–65 (2012).
[17] *See* REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING at § 6.1 at 101, § 8.21 at 188 (1986).
[18] *Id.* at § 8.21 at 189.
[19] *Id.* at § 6.1 at 103.
[20] *See, e.g.*, LYNN BAHRYCH & MARJORIE DICK ROMBAUER, LEGAL WRITING IN A NUTSHELL 134–35 (2003); HOWARD DARMSTADTER, HEREOF, THEREOF, AND EVERYWHEREOF: A CONTRARIAN GUIDE TO LEGAL DRAFTING 58–61 (2008).
[21] *See* 101 PA. CODE §15.129 (2022).
[22] ROBERT N. COOK, LEGAL DRAFTING 31–32 (1951).
[23] ROBERT C. DICK, LEGAL DRAFTING 110 (1972).
[24] *See* COOK, *supra* note 22, at 32 (discussing exemption parentheticals).

virtue of their placement.[25] Less important words are dangerous in statutes, for judges typically follow clear statements from Congress,[26] and "afterthoughts" or "asides" might not meet that requirement.[27] A large number of state drafting guides have followed suit, explicitly disfavoring parentheses.[28] Even though this dominant view discredits helpful uses for parentheses in legal documents and incorrectly assumes parenthetical phrases to be unimportant, it is right in one regard. Courts seem to have trouble determining the weight they should give to matter within parentheses. If the ambiguity faced by courts confronting parentheses is grievous, then the textualist argument against their inclusion holds water, despite the extensive history of the statutory parenthesis.

III. PARENTHESES AND STATUTORY INTERPRETATION IN PRACTICE

A. THE SUPREME COURT

The Supreme Court has not issued explicit guidance on the role of parentheses in statutes. Their opinions, however, resemble the dominant view that parenthetical information should be disfavored. The Court first addressed parentheses in the

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[25] BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES 153 (2001); BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE § 1.33–34, 24 (2006); *see also* MORTON S. FREEMAN, THE GRAMMATICAL LAWYER 17 (1979); LENNÉ EIDSON ESPENCHIED, THE GRAMMAR AND WRITING HANDBOOK FOR LAWYERS 96 (2011).

[26] *See, e.g.*, Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 Wash. U. L. Rev. 351, 376 (2019).

[27] BRYAN A. GARNER, GARNER'S MODERN ENGLISH USAGE: THE AUTHORITY ON GRAMMAR, USAGE, AND STYLE 1020 (2016)

[28] *See, e.g.*, ALA. LEGIS., *Drafting Rule 11* (2021), https://alison.legislature.state.al.us/legal-division-manual#rule11; STATE OF ARK. BUREAU OF LEGIS. RSCH., LEGISLATIVE DRAFTING MANUAL 48; LEGIS. COMM'RS OFF. OF THE CONN. GEN. ASSEMBLY, MANUAL FOR DRAFTING REGULATIONS 40 (2018); LEGIS. COUNCIL DIV. OF RSCH., DELAWARE LEGISLATIVE DRAFTING MANUAL 97 (2019); KY. GEN. ASSEMBLY, BILL DRAFTING MANUAL 40 (2021); OFF. OF THE REVISOR OF STATUTES, MAINE LEGISLATIVE DRAFTING MANUAL 127 (2016); ALICE E. MOORE & DAVID NAMET, MASSACHUSETTS GENERAL COURT: LEGISLATIVE RESEARCH AND DRAFTING MANUAL 25 (2010); OFF. OF THE REVISOR OF STATUTES, MINNESOTA REVISOR'S MANUAL 313 (2013); N.M. LEGIS. COUNCIL SERV., LEGISLATIVE DRAFTING MANUAL 97 (2015); LEGIS. COUNCIL, NORTH DAKOTA LEGISLATIVE DRAFTING MANUAL 109 (2023); GEN. ASSEMBLY OF TENN. OFF. OF LEGAL SERVS., 2019 LEGISLATIVE DRAFTING GUIDE 14 (2019); TEX. LEGIS. COUNCIL, TEXAS LEGISLATIVE COUNCIL DRAFTING MANUAL 102 (2020). This list not exhaustive, and there exceptions. *See, e.g.*, LEGIS. REFERENCE BUREAU, ILLINOIS BILL DRAFTING MANUAL 237 (2012) ([U]se commas or parentheses to set off an inserted phrase . . . .").

seminal case of *Chickasaw Nation v. United States*.[29] Both the majority and dissent acknowledged that parentheses played a role, but they battled over how much weight marks should be given. The parenthesis lost the battle in both the majority and dissenting opinions.

At stake in *Chickasaw Nation* were tax exemptions for Native American tribes.[30] Specifically, the Court examined language in the Indian Gaming Regulatory Act that reads:

> The provisions of [the Internal Revenue Code] (including sections 1441, 3402(q), 6041, and 60501, and chapter 35 of such [Code]) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter . . . .[31]

Two tribes argued that they were exempt from paying Chapter 35 taxes under this law since it was included in the illustrative parenthetical, even though Chapter 35 had nothing to do with the "reporting and withholding" of taxes.[32] The parenthetical illustration was at odds with the rest of the statute. Although the case primarily concerned the Native American substantive canon of construction,[33] the Court discussed the parentheses to determine whether the statute was ambiguous.

Writing for the majority, Justice Breyer declined to give the parenthetical controlling weight. He began by saying that the language outside the parentheses was clear, limiting the illustration to items related to reporting and withholding and thereby making the illustration redundant:[34] If the items were already implicated in the outside language, why would examples be necessary to the meaning or effects of

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[29] 534 U.S. 84 (2001).
[30] *Id.* at 86.
[31] *Id.* at 87.
[32] *Id.*
[33] *Id.* at 88.
[34] *Id.* at 89 ("One would have to read the word 'including' to mean what it does not mean, namely, 'including,' 'and.'")

the statute? In his words, "the presence of a bad example in a statute does not warrant rewriting the remainder of the statute's language,"[35] especially when Congress would likely have made an exemption explicitly. Finally, the "give effect to each word" canon[36] was found to be inapplicable since Chapter 35 would deny the purpose of the statute and was set aside from the outside language anyway.[37] To the majority, "[a] parenthetical is, after all, a parenthetical, and it cannot be used to overcome the operative terms of a statute."[38] The majority therefore endorsed the normal view of the legal community: parentheses deemphasize information.

Writing for the dissent, Justice O'Connor wrote that the language inside the parenthetical controlled. To her, however, the parentheses themselves were unimportant, mirroring her broad claim in *Ron Pair*.[39] Writing in a more purposivist fashion, O'Connor said that the parentheses, and the punctuation in general, did not matter and could be changed since a close analysis might "distort[] a statute's true meaning."[40] And reading without clear punctuation, she found that, if Congress included the illustration, there was reason to question both interpretations.[41] O'Connor concluded that there is "no generally accepted canon of statutory construction favoring language outside of parentheses to language within them, nor do I think it wise for the Court to adopt one today."[42] The dissent thought the text ambiguous enough to favor the tribes and the substantive canon at issue.

Neither opinion offered the parentheses support. On the one hand, the majority suggested that illustrative parentheticals are superfluous support for information already written. This would contradict traditional usage in favor of an overbroad grammatical understanding. On the other hand, the dissent would move back to the *Ewing's Lessee* days and ignore contrarian but congressionally approved

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[35] *Id.* at 90.
[36] *See supra* note [not included in this writing sample] and accompanying text.
[37] *Id.* at 93–94.
[38] *Id.* at 95 (quoting Cabell Huntington Hosp., Inc. v. Shalala, 101 F.3d 984, 990 (4th Cir. 1996)).
[39] United States v. Ron Pair Enters., Inc., 489 U.S. 235, 250 (1989) (O'Connor, J, dissenting).
[40] 534 U.S at 98 (O'Connor, J., dissenting) (quoting U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 454 (1994)).
[41] *Id.*
[42] *Id.* (citation omitted).

punctuation. It was not until last Term that the Supreme Court substantively addressed the use of statutory parentheticals.[43] In these cases, the Justices mostly steered towards the majority's view in *Chickasaw Nation*, that parentheticals should not control meaning but added a grammatical presumption to the mix.

The first case, *Boechler v. Commissioner*, involved a statute that allows one to "within 30 days of a determination under this section petition the Tax Court for review of [a] determination *(and the Tax Court shall have jurisdiction with respect to such matter)*."[44] The illustrative parentheses here allow a reader to question whether the tax court has jurisdiction over the issue *only during the 30-day period*. Finding the statute ambiguous, the Court turned to the use of parentheses as a punctuation mark and dismissed them out of hand, finding them not to indicate an "express" condition.[45] Quoting Garner, the Court formally took the view that a parenthetical is "typically used to convey an 'aside' or 'after thought.'"[46]

The next case, *Becerra v. Empire Health Foundation*,[47] solidified this renewed disfavoring of parentheses. At issue was a "byzantine" hospital reimbursement statute that said a hospital could be refunded based on a fraction.[48] That fraction is calculated in part by counting "'the number of [a] hospital's patient days' attributable to low-income patients 'who *(for such days)* were entitled to benefits under part A of [Medicare].'"[49] A similar fraction is calculated for Medicaid, and the two are added together to determine a possible refund.[50] The ambiguity involved how Medicare patients are counted in the fraction of days which they are not eligible for payment.[51] The respondent hospital argued that a regulation finding such patients eligible is not

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[43] United States v. Woods, 571 U.S. 31 (2013), did graze the issue, but the interpretation revolved mostly around the meaning of words, not the parenthesis as a punctuation mark. *Id.* at 45–46.
[44] Boechler v. Commissioner, 142 S. Ct. 1493, 1497 (2022) (emphasis added).
[45] *Id.* at 1498.
[46] *Id.* (quoting BRYAN A. GARNER, GARNER'S MODERN ENGLISH USAGE: THE AUTHORITY ON GRAMMAR, USAGE, AND STYLE 1020 (2016)).
[47] 142 S. Ct. 2354 (2022).
[48] *Id.* at 2362 (quoting Cath. Health Initiatives Iowa Corp. v. Sebelius, 718 F.3d 914, 916 (2013))
[49] *Id.* at 2358 (quoting 42 U.S.C. § 1395ww(d)(5)(f)(vi)(I) (2018) (emphasis added)).
[50] *Id.* at 2360.
[51] *Id.* This would happen, for instance, if a Medicare user had private insurance. *Id.*

reflected in the statutory language.[52] As part of its argument, it read "entitled" to be modified by the parenthetical "(for such days)."[53] This interpretation would mean that a patient must be able to *actually receive* Medicare for their hospital days, rather than simply meeting Medicare's automatic enrollment requirements.

The majority tore that reading apart. Justice Kagan, citing *Boechler*, said that Congress would not wish to change a statutory scheme with parentheses and so "(for such days)" is "incapable of bearing so much interpretive weight."[54] Congress would not change that "settled" statutory definition of being entitled to benefits by using a "subtle, indirect, and opaque" punctuation mark.[55] Instead, that parenthetical works "hand in hand" with the normal definition of entitlement and asks hospitals to include a patient when he is eligible for Medicare on a given day.[56] This makes sense. The parenthetical did not clearly provide a new definition nor did it use exemplifying words to indicate a departure from the common meaning.

Though correctly decided, however, the majority went too far in their treatment of punctuation. The decision could have been narrowly written to disfavor only these particular illustrative marks. Instead, Kagan deemed parentheses to be altogether unhelpful in determining congressional intent by virtue of Garner's incorrect grammatical understanding. Writing for the dissent in this 5–4 case, Justice Kavanaugh addressed this misunderstanding, saying that "[p]arentheticals can be important."[57] To be sure, the parentheses were only a small part of this case and its conclusion, but they nevertheless played a role in both statutory interpretations and underscored disagreement about their importance in hard cases.

Regardless of the Court's poor treatment in *Empire Health*, a majority (that included Justice Kagan) used a parenthetical to establish jurisdiction in *Biden v. Texas*.[58] The provision in question decreed that "no court (other than the Supreme

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[52] *Id.* at 2361.
[53] *Id.* at 2365.
[54] *Id.* (citing Boechler v. Commissioner, 142 S. Ct. 1493, 1498 (2022)).
[55] *Id.*
[56] *Id.*
[57] *Id.* at 2369 (Kavanaugh, J., dissenting) (pointing out Constitution provisions with parentheses).
[58] 142 S. Ct. 2528, 2538 (2022).

Court) shall have jurisdiction or authority to enjoin or restrain the operation of [certain immigration statutes]."[59] One issue in this case was whether lower courts had subject matter jurisdiction for such injunctive immigration cases. For the majority, the Chief Justice wrote that "the parenthetical explicitly preserv[ed] this Court's power to enter injunctive relief."[60] It determined that Congress had given the Court a specific "carveout" that permitted the injunctive relief case at bar.[61] To ignore the parenthetical exception that Congress "took pains" to address would be, in the majority's view, to fail the "give effect" presumption of statutory interpretation.[62] In other words, if lower courts could not grant relief, then the parenthetical exception would not have any use. And parenthetical exceptions must have use under the "give effect canon" since Congress set the exception apart.

Justice Barrett took a different view. She noted that the majority gave "surprisingly little attention" to the parenthetical, which "does not appear to have an analogue elsewhere in the United States Code."[63] Specifically, the dissent posited that the parenthetical might *illustrate* preexisting jurisdiction rather than provide an *exemption* in certain cases.[64] This ambiguity, among other reasons, is reason enough for the Court to reconsider the parenthetical, despite its "surface appeal."[65] Though the possibility of reconsideration remains in light of the dissent, this case departs from the presumption against parentheses because a parenthetical granting jurisdiction was allowed to control against an otherwise restrictive outside text.

The debate over parentheticals continues today. The Court recently heard arguments in *Sackett v. EPA*,[66] which concerns whether wetlands are navigable waters of the United States. One clue comes from a statute allowing "any State desiring to administer its own . . . program for the discharge of dredged or fill

[59] *Id.* (quoting 8 U.S.C. § 1252(f)(1) (2018)).
[60] *Id.* at 2539.
[61] *Id.*
[62] *Id.* (quoting Williams v. Taylor, 529 US. 362, 404 (2000)).
[63] *Id.* at 2561 (Barrett, J., dissenting).
[64] *Id.* at 2562.
[65] *Id.*
[66] Sackett v. EPA, No. 21-454 (Sup. Ct., Oct. 3, 2022).

material into the navigable waters (other than those waters which are presently used, including wetlands adjacent thereto) within its jurisdiction" to submit a request for such a program.[67] This law seems to indicate that navigable waters might include wetlands since they were mentioned as an example in the parenthetical. Though there are questions concerning the meaning of "adjacent,"[68] a larger question is whether Congress wished to change or define navigable waters using this parenthetical.[69] The Sacketts maintained that this parenthetical should not be read to control the statutory meaning as it would be "an inversion of statutory interpretation to say that this parenthetical reference in a provision dealing principally with permit . . . changes the scope of the central definitional portion of the Act . . . ."[70] The Sacketts also cited the *Boechler* decision and its adoption of the Garner view in their brief.[71] And, during oral arguments, Justice Alito questioned the use of the parenthetical to provide a "clear statement" of congressional intent.[72] The parenthetical alone might not determine the outcome of this case, but it will likely contribute to the broader discussion.

In summary, these cases demonstrate that the modern, textualist Supreme Court has not firmly determined how parentheses are to be weighed in statutes. Overall, however, it seems as if parentheticals are disfavored in tough cases. *Chickasaw Nation* said it outright regarding conflicting illustrative parentheticals. New decisions defer to Garner's view: that parentheses indicate unimportant asides and should therefore not control meaning. The decision in *Biden v. Texas*, meanwhile, offers the opposite conclusion given the Court's explicit reliance on a parenthetical. The treatment of the parenthesis is an ongoing debate in the Court, and there is no clear trend one way or another from the lower courts in years past.

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[67] 33 U.S.C. § 1344 (2018).
[68] *See* Transcript of Oral Argument at 33, *passim*, Sackett v. EPA (Oct. 3, 2022) (No. 21-454).
[69] *See id.* at 27–29.
[70] *Id.* at 57–58.
[71] Reply Brief for Petitioner at 7, Sackett v. EPA, No. 21-454 (Sup. Ct. July 8, 2022).
[72] Transcript of Oral Argument at 106, Sackett v. EPA (Oct. 3, 2022) (No. 21-454).

Applicant Details

First Name	**Rachel**
Middle Initial	**A**
Last Name	**Danner**
Citizenship Status	**U. S. Citizen**
Email Address	**rad114@georgetown.edu**
Address	**Address** Street **620 4th St. NE** City **Washington** State/Territory **District of Columbia** Zip **20002** Country **United States**
Contact Phone Number	**(919) 259-2800**
Other Phone Number	**(919) 259-2800**

Applicant Education

BA/BS From	**Brown University**
Date of BA/BS	**May 2020**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 20, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Journal on Poverty Law and Policy**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Wolfman, Brian
wolfmanb@georgetown.edu
Han, Eun Hee
eh79@georgetown.edu
Mezey, Naomi
mezeyn@georgetown.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Rachel Danner
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June 12, 2023

The Honorable Juan R. Sanchez
James A. Byrne U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Chief Judge Sanchez:

I am writing to apply for a clerkship with your chambers beginning in 2024. I am a rising third-year student at Georgetown University Law Center, an Executive Articles Editor on the Georgetown Journal for Poverty Law and Policy, and a summer associate in McDermott Will & Emery's D.C. office.

A clerkship with your chambers would align with my long-term goals of deepening my understanding of the judicial process and becoming an effective advocate for my future clients. This past semester, I participated in Georgetown's Appellate Courts Immersion Clinic, and was able to contribute to the briefing and arguing of pro bono public interest cases in federal courts of appeals. I will continue to be part of the clinic during my final year of law school as a research assistant to the clinic's director. The experience has trained me to analyze complex legal questions and communicate about them effectively and succinctly in writing. I hope to make use of these skills, and to continue developing them, via a clerkship.

Enclosed please find my resume, law school transcript, and writing sample. The writing sample is a memorandum I prepared for the Appellate Courts Immersion Clinic. Letters of recommendation from the following people are included with my application: Brian Wolfman – Professor from Practice and Director, Appellate Courts Immersion Clinic, (202) 661-6582; Naomi Mezey – Agnes Williams Sesquicentennial Professor of Law and Culture, (202) 662-9854; and Eun Hee Han – Associate Professor of Law, Legal Practice, eh79@georgetown.edu.

Please let me know if you need any additional information. Thank you for your consideration.

Respectfully,

Rachel Danner

Rachel Danner
620 4th St. NE Washington, D.C. 20002 • rad114@georgetown.edu • (919) 259-2800

Education

Georgetown University Law Center Washington, D.C.
Juris Doctor candidate, May 2024
GPA: 3.94, Dean's List 2021-2022
Journal: Georgetown Journal on Poverty Law & Policy, *Executive Articles Editor*
Honors & Activities: Appellate Courts Immersion Clinic, Public Interest Law Fellow

Brown University Providence, R.I.
Bachelor of Arts, *magna cum laude* in Public Health, May 2020
Honors: Phi Beta Kappa
Senior Paper: The North Carolina Health Opportunities Pilot: An Innovative, Bipartisan Approach to Address the Social Determinants of Health in Medicaid Populations

Experience

McDermott Will & Emery, *Summer Associate* Washington, D.C. | Summer 2023

Georgetown Law Appellate Courts Immersion Clinic, *Student Counsel* Washington, D.C. | Spring 2023
- Researched and drafted appellate briefs in pro-bono public interest cases related to civil rights and employment discrimination
- Assisted with oral argument preparation for cases in front of the 5th, 8th, and D.C. Circuits
- Collaborated with fellow students and staff attorneys on related projects in support of ongoing cases

O'Neill Institute for National and Global Health Law, *Research Assistant* Washington, D.C. | Fall 2022
- Contributed to COVID-19 Law Lab database of global pandemic response measures
- Assisted with health law scholarship articles in preparation for publication

U.S. Department of Labor, EBSA, *Legal Intern* Washington, D.C. | Summer 2022
- Interned with Office of Health Plan Standards and Compliance Assistance
- Assisted in drafting regulatory and sub-regulatory guidance implementing provisions of ERISA relating to group health plans, including the No Surprises Act and the Mental Health Parity and Addiction Equity Act
- Prepared public comment summary for comments submitted pursuant to No Surprises Act interim final rules
- Worked with Office of Outreach, Education and Assistance to respond to stakeholder questions
- Researched and prepared summary of state laws relating to network accuracy requirements

CDC Foundation, *COVID-19 Contact Tracer* Washington, D.C. | July 2020 – December 2022
- Communicated with contacts of diagnosed COVID-19 cases and provided quarantine and isolation instructions
- Referred contacts for testing and connected them to community social services

Rhode Island Center for Justice, *Policy Intern and Interpreter* Providence, R.I. | Fall 2018 – Spring 2020
- Conducted policy research and coordinated advocacy for vulnerable communities with a focus on education, housing, and utility justice
- Communicated with Spanish-speaking clients and coordinated services to address needs

Interests

- Conversationally fluent in Spanish
- Crochet and jigsaw puzzles

Record of: Rachel Amelia Danner
GUID: 815916206

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	001	93	Legal Process and Society Naomi Mezey	4.00	A+	17.32	
LAWJ	002	93	Bargain, Exchange, and Liability David Super	6.00	A	24.00	
LAWJ	005	32	Legal Practice: Writing and Analysis EunHee Han	2.00	IP	0.00	
LAWJ	009	33	Legal Justice Seminar Philomila Tsoukala	3.00	B+	9.99	

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	51.31	3.95
Cumulative	13.00	13.00	51.31	3.95

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	003	93	Democracy and Coercion Louis Seidman	5.00	A-	18.35	
LAWJ	005	32	Legal Practice: Writing and Analysis EunHee Han	4.00	A	16.00	
LAWJ	007	93	Property in Time Daniel Ernst	4.00	A	16.00	
LAWJ	008	31	Government Processes Howard Shelanski	4.00	A	16.00	

Dean's List 2021-2022

	EHrs	QHrs	QPts	GPA
Current	17.00	17.00	66.35	3.90
Annual	30.00	30.00	117.66	3.92
Cumulative	30.00	30.00	117.66	3.92

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	1493	05	Prison Law and Policy Shon Hopwood	3.00	A-	11.01	
LAWJ	165	02	Evidence Michael Pardo	4.00	A	16.00	
LAWJ	178	05	Federal Courts and the Federal System Carlos Vazquez	4.00	A	16.00	
LAWJ	215	09	Constitutional Law II: Individual Rights and Liberties Randy Barnett	4.00	A+	17.32	

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	60.33	4.02
Cumulative	45.00	45.00	177.99	3.96

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	049	05	Appellate Courts and Advocacy Workshop	2.00	A	8.00	
LAWJ	504	05	Appellate Courts Immersion Clinic		NG		
LAWJ	504	30	~Writing	4.00	A-	14.68	
LAWJ	504	80	~Research and Analysis	4.00	A	16.00	
LAWJ	504	81	~Advocacy & Client Relations	4.00	A	16.00	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	14.00	14.00	54.68	3.91
Annual	29.00	29.00	115.01	3.97
Cumulative	59.00	59.00	232.67	3.94

End of Juris Doctor Record

GEORGETOWN LAW

Brian Wolfman
Associate Professor of Law
Director, Appellate Courts Immersion Clinic

June 8, 2023

Re: Clerkship recommendation for **Rachel Danner**

I'm writing to provide my enthusiastic recommendation for Rachel Danner to serve as your law clerk.

I got to know Rachel during spring semester 2023, when she was a student-lawyer in the Appellate Courts Immersion Clinic at Georgetown University Law Center. (I am the clinic's director.) The clinic handles complex appeals in the federal courts of appeals and in the Supreme Court. Students act as the principal lawyers researching and writing briefs under my supervision.

The clinic operates full-time. Students take no classes other than the clinic and a co-requisite seminar about the law of the appellate courts. (I comment on Rachel's seminar performance later in this letter.) I worked with Rachel every day for an entire semester and was able to observe her as a judge would observe a law clerk or as a senior lawyer might observe a close associate. This letter, therefore, is based not on one exam, a handful of comments in class, or even a few meetings, but on an intensive, day-to-day working relationship.

I'll start with my bottom-line recommendation: Rachel would be an excellent clerk. Rachel did fine work across the board. Her analytical skills are top notch. She combines thoughtfulness with practicality. Her writing is generally clear and persuasive, and it is always shorn of pretense and jargon. I'm confident she has the writing skills expected of judicial law clerks.

One more point before getting into the details of Rachel's clinic work: Rachel was a second-year student when she was in our clinic. The great majority of the clinic's students are 3Ls, who often are better prepared than 2Ls to work on complex appellate litigation. That Rachel excelled in our clinic alongside her 3L peers, should, in my judgment add value to this

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PHONE 202-661-6582 FAX 202-662-9634
wolfmanb@law.georgetown.edu

recommendation. Rachel is simply more mature and more sophisticated about the law than most of her classmates.

I'll turn now to Rachel's major clinic projects.

First, Rachel worked under my direct supervision on a reply brief to the D.C. Circuit in an appeal seeking to topple a decades-old circuit precedent holding that a particular statute of limitations is "jurisdictional" and thus cannot be equitably tolled. Working with two other students, Rachel explained why, under circuit procedures, the prior precedent could be overruled by a panel without input from the en banc court. In addition, Rachel was solely responsible for arguing why, if the statutory time limit was nonjurisdictional, our client was entitled to tolling based on extraordinary, pandemic-related circumstances. Rachel did a beautiful job with the project. She turned up new and useful authority, and her writing was clear and succinct.

Rachel's two other projects were also challenging. In one, Rachel was asked to draft a petition for rehearing en banc involving the intersection of the Sixth Amendment speedy-trial right and *Younger* abstention. We were starting largely from scratch because the clinic hadn't handled the case at the panel stage. The issues would have been difficult for most experienced lawyers, yet Rachel understood them quickly, and she, alongside two colleagues, produced an excellent petition on a short timeline. Next, Rachel worked on an opening brief concerning whether a state's system of prison good-time credits triggers Fourteenth Amendment procedural due-process protections. The case required an understanding of a complex statutory and regulatory scheme, and Rachel showed great aptitude for separating what mattered from what did not.

Rachel took on another task that deserves special mention. Early in the semester, at the same time she was beginning her first brief-writing project, we asked Rachel to help prepare one of our staff lawyers for oral argument in the Eighth Circuit—for an employment-discrimination appeal involving both a large record and an important legal issue. We don't often ask our students to juggle like this, but Rachel was up to the task. She quickly and accurately ran down new authority, condensed the record for use at argument, and mooted the oralist. Rachel did this while getting her other clinic work done well and on time.

* * *

As noted at the beginning of this letter, students in my clinic are enrolled in a separately assessed seminar—the Appellate Courts and Advocacy

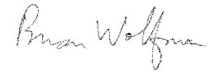
Workshop. The first two-thirds of the course is an intensive review of basic federal appellate law doctrine, including the various bases for appellate jurisdiction and the standards and scope of review. In this part of the course, students must master the difficult doctrinal material and apply it in a half dozen challenging writing assignments ranging from a motion to dismiss for lack of appellate jurisdiction to a statement of the case to a complex jurisdictional statement. We then take a short detour into Supreme Court jurisdiction and practice. Toward the end of the course, we cover a few advanced legal writing and appellate advocacy topics. Only capable students willing to work hard do well in this course. Given the course's subject matter and its blend of doctrine, writing, and practice, the course often appeals to students who desire clerkships. Rachel's work in this class was consistently strong. Again, her writing and analysis were excellent. Rachel received an "A" in a class populated by high-achieving students.

* * *

Rachel has more going for her than pure legal talent. She's a great colleague. She's fun to work with and has a quick wit. She's self-confident, but always ready to learn. She is honest and forthright. Importantly, she is not overly deferential. When she saw a problem that others did not, she brought it to the attention of colleagues, including older, more experienced mentors like myself, because she wanted to get things right and help our clients. For these reasons as well, Rachel would be an excellent addition to any judicial chambers.

I'll end where I began: I enthusiastically recommend Rachel Danner for a clerkship. If you would like to talk about Rachel, please contact me at 202-661-6582.

Sincerely,



Brian Wolfman

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write this letter in support of Rachel Danner's application for a clerkship in your chambers. I have known Rachel since the fall of 2021, when she was enrolled in my full-year Legal Practice course, which covers legal research, writing, and analysis, at Georgetown University Law Center. Rachel is a wonderful student who demonstrated intellectual curiosity, excellent research and writing skills, and a true collegiality and caring for others. I know if given the opportunity, Rachel would make an excellent law clerk based on her strong legal writing abilities and desire to make a positive impact as a lawyer in practice.

As a first-year student in my Legal Practice course, Rachel stood out in her ability to consider all aspects of a legal issue in a careful, thoughtful, and insightful manner. She was always prepared for class sessions and quickly established herself as a considerate colleague in class discussions. Rachel's contributions to class discussions were always relevant and insightful, but what set her apart was that she would truly listen to others' contributions and respond to them or amplify them to take a discussion to the next level. Rachel's written work in my course also showed her ability to think through all aspects of a given problem, complete thorough research, and communicate in the effective and polished manner I would expect of a junior attorney in practice. In short, Rachel is more than ready to complete work in a professional setting.

Beyond her academic strengths, Rachel is a truly positive and considerate person who is wonderful to work with. She had a strong rapport with her colleagues in class, both offering her own contributions during group exercises and actively listening to and incorporating others' suggestions. In peer review assignments, particularly, Rachel was generous and courteous in her written feedback, which in its thoroughness showed a willingness to take the time to help her partner improve. Rachel also regularly sought to advance her writing skills in one-on-one meetings with me, and I never had to provide the same feedback twice.

Rachel is a gifted legal writer and a generous colleague, and I recommend her without reservation. If I can be of any other assistance, please feel free to contact me at eh79@georgetown.edu.

Sincerely,
Eun Hee Han
Associate Professor of Law, Legal Writing

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It is with enthusiasm and complete confidence that I recommend Rachel Danner for a clerkship in your chambers. Rachel is at the very top of her class; she has journal, clinic, and professional experience; and she has an impressive work ethic. In addition, Rachel is a fundamentally fair-minded and thoughtful person who can see multiple sides of divisive issues. She will make a superb law clerk and lawyer.

I know Rachel because she was my student during her first semester of law school. I taught her in a class called Legal Process, which is our alternative curriculum's course in civil procedure. Georgetown's well-regarded alternative curriculum is innovative, challenging, and provides students with all the basic doctrinal tools of the first year as well as a grounding in jurisprudence. Students in the alternative curriculum learn the history of American legal thinking, from natural law and formalism through legal realism, law and economics, and more modern jurisprudential trends. This provides students with another layer of critical skills that allows them to understand the law through the lens of both philosophy and politics. To complement the theory they learn, my Legal Process students also do a number of hands-on exercises and problem-based simulations that give them a better appreciation for how civil procedure works in practice.

Rachel did spectacularly well in Legal Process. She aced both quizzes and her exam tied for the best exam in a class of 115 very bright students. That semester there were two exams with the same score at the very top of the class and there was a meaningful gap between those two exams and the other exams that earned an A. Rachel was in that elite group of two and I had no hesitation awarding her a rare A+ for her performance. Her exam showed that she was able to see the big picture, to hit all the granular issues, and knew how to do careful and sophisticated legal analysis. Not only did she display a masterful command of procedural doctrine, but she was able to appreciate the questions that the doctrine hadn't yet answered as well as how legal questions vary with different facts. In short, Rachel is undaunted by the most complex procedural rules or the most convoluted judicial opinions and is exceptional at seeing the nuances in a case without losing sight of the core questions.

Although Rachel did not speak frequently in class, when she did participate, her comments and questions demonstrated that she thoughtful, curious, intellectually engaged with the material, well prepared, and able to contribute in a way that advanced and enriched the discussion for everyone. I recall that Rachel was especially engaged in our class discussions about procedural due process and asked probing questions about the *Lassiter* case. She told me later that she had been struck by the ways that threshold issues such as access to legal information and to lawyers could have dramatic individual consequences. She saw early on how procedural developments directly and indirectly affect substantive legal rights, as well as how the politics of procedure often garners little public attention.

It is also important to remember that her impressive performance in Legal Process was during a year of uncertainty and anxiety for all students. It was our first time back in the classroom, everyone was masked, and the impacts of the pandemic were evident in every aspect of academic life and in many students' personal lives as well. Given that context, it took an unusual amount of discipline and focus to do as well as Rachel did.

Rachel is someone with an abiding concern for health care and health access, and she has pursued that interest as a summer intern at the Department of Justice, working on health plan standards and compliance, and also as a research assistant for the O'Neil Institute for National and Global Health Law, working on data collection and scholarship about the pandemic response. I have a vivid memory of meeting Rachel just before 1L classes began when I held online group meetings for incoming students. I was especially struck by Rachel's answer when I asked the group what they had been doing prior to starting law school. Rachel had been working as a COVID contact tracer in her home state of North Carolina, a place she described as "beautiful and complicated, with lovely beaches and bitter politics." It wasn't just the job that caught my attention, but the way she spoke about the people she met and the intense and intimate conversations she had with individuals for whom staying home from work could threaten their precarious livelihoods. What was most evident was Rachel's empathy for the people she interacted with and her ability to acknowledge the human costs of a health care policy she was working to support. In this brief conversation she demonstrated her decency, maturity, and professionalism.

Despite her on-going interest in health care, Rachel has been open-minded and eager to learn new things and pursue unexpected interests. One such unexpected interest is procedure. Given her early instincts for procedural thinking, it is perhaps not surprising that Rachel became something of a procedure enthusiast. That enthusiasm for her process-focused classes influenced her decision to apply to the Appellate Courts Immersion Clinic, an experience she described to me as "transformative." Her experience working in the clinic motivated her to apply for a clerkship and to explore litigation as a career.

Naomi Mezey - mezeyn@georgetown.edu

As I have gotten to know Rachel, I have come to appreciate the person she is and the impressive skills she has acquired. In addition to being wildly successful by all the traditional law school standards, Rachel is a lovely and self-reflective person. She is also someone with the maturity to see both the importance of large-scale legal policies and the human variation in how those policies are applied in real life. She also has the decency to care about that difference and its effects.

Rachel is a star. She is so smart, hard-working, and talented that one hardly needs to look beyond the resume. What is less clear from an initial acquaintance is how thoughtful she is and how much maturity she possesses. It is a constellation of qualities that will make her a wonderful and utterly reliable clerk. I am confident that she would work incredibly hard for you and impress you with her analytical skill, keen intelligence, and discretion. I recommend Rachel to you with complete confidence and enthusiasm.

If I can be of further assistance, please do not hesitate to let me know. The easiest way to reach me is by email or by calling my cell phone: 202-802-1836.

Sincerely,

Naomi Mezey
Agnes Williams Sesquicentennial Professor of Law and Culture

Writing Sample

The attached writing sample is a memorandum I recently prepared as a research assistant for Georgetown's Appellate Courts Immersion Clinic. It analyzes the possible claims that an individual could include in a state habeas petition challenging his sentence and commitment in state prison. All identifiable citations (including statutory citations) have been modified to preserve the anonymity of the person and are thus no longer accurate. Names, dates, and other details have also been changed. The redactions have been approved by a supervising attorney. The sample has not otherwise been edited by anyone else.

Memorandum

I. Question Presented

What are the possible arguments John Smith could present in a state habeas petition challenging his detention in Louisiana state prison?

II. Background

John Smith is currently serving a sentence of 33 years to life in Louisiana state prison for a 2011 felony conviction for reckless driving. A first offense for reckless driving involving injury to another person generally carries a maximum term of one year in prison, plus fixed enhancements depending on the kinds of injuries sustained by others. *See* La. Stat. Ann. § 14:100. Mr. Smith, however, was sentenced under Louisiana's repeat-offender law, which imposes lengthy indeterminate sentences on defendants who have committed two or more prior serious or violent felonies. *See* La. Stat. Ann. § 15:529.1.

During the 13 years he has already served for this offense, Mr. Smith has sought relief through several channels, including direct appeal, administrative challenges within the Louisiana prison system, and federal and state habeas petitions. None of these efforts has so far been successful. Outlined below, after a discussion of Mr. Smith's circumstances, are various possible claims he could include in a new state habeas petition challenging the lawfulness of his sentence and commitment.

A. Mr. Smith's Criminal History

1. Past Criminal History

The felony reckless driving conviction was Mr. Smith's fourth qualifying offense for purposes of Louisiana's repeat-offender law. When defendants have two or more prior qualifying offenses, they can receive life sentences on top of any other sentence or enhancement

imposed. *See* La. Stat. Ann. § 15:529.1(4)(a). All his three prior qualifying offenses occurred on the same day in 1982, when he and his cousin, both 19 at the time, committed a series of unarmed convenience-store robberies.

Between 1982 and 2010, when the reckless driving incident occurred, Mr. Smith was convicted of a number of other felonies, misdemeanors, and parole violations, none of which constituted a qualifying offense. Five of these other violations resulted in time served in prison. This is noteworthy because in 2011, at the time Mr. Smith was sentenced, Article 120(b) of the Louisiana Code of Criminal Procedure allowed for a one-year sentence enhancement for each prior term served in prison. *See* La. Code Crim. Proc. Ann. art. 120(b). The relevant offenses included convictions in 1987, 1990, and 1992, and two convictions for simple possession of a controlled substance in 1998 and 2004. Since the passage of Proposition 50, simple possession is no longer a felony offense, which means that under current law Mr. Smith had not committed a felony offense in the 18 years leading up to the reckless driving incident.

2. Instant Conviction

In 2010 Mr. Smith was involved in a car accident. His cousin, the sole passenger in his vehicle, broke his femur in the crash. Three individuals in another vehicle were also injured. Mr. Smith was ultimately convicted of two violations of the Louisiana Criminal Code, for reckless driving and hit and run. *See* La. Stat. Ann. §§ 14:99; 14:100.

3. Sentence Enhancements

At sentencing Mr. Smith received a three-year enhancement for inflicting "great bodily injury" on his cousin. La. Stat. Ann. § 13022(a). He also received multiple enhancements for prior criminal activity. Because of his prior qualifying offenses, he received an enhancement of 25 years to life. Additionally, at the time Mr. Smith was sentenced there were two different

provisions of the Louisiana Code of Criminal Procedure that provided for other sentence enhancements for prior criminal activity. Article 100(a) mandated a five-year enhancement for any defendant with a prior serious felony. La. Code Crim. Proc. Ann. art. 100(a). Article 120(b) allowed for a one-year enhancement for any prior term served in prison. La. Code Crim. Proc. Ann. art. 120(b). Mr. Smith received both a five-year enhancement and five one-year enhancements. However, two procedural irregularities occurred in the application of these enhancements.

First, the five-year enhancement is listed on his Abstract of Judgement, the official record of his sentence, not as pursuant to 100(a) but rather 120(b). Second, the five one-year priors, correctly listed under 120(b), were imposed but "stayed" by the sentencing judge, meaning that they did not actually add additional years to his sentence. On direct appeal, the court found that there was no basis for imposing and staying the five one-year enhancements and ordered them stricken from his Abstract of Judgment. *People v. Smith*, No. E049586, 2011 WL 901027, at *4 (La. App. 2 Cir. 4/16/2011). Both irregularities are discussed below.

B. Mr. Smith's Social and Psychological History

[Redacted]

C. Timeliness

The timeliness of a new petition should not be an issue for two reasons. First, Mr. Smith can argue that his petition is not untimely because it is filed without substantial delay and with good cause. Timeliness of habeas petitions is measured "from the time the petitioner or his counsel knew, or reasonably should have known, the information offered in support of the claim and the legal basis for the claim." *In re Robbins*, 18 La. App. 4 Cir. 770, 780 (1998). Mr. Smith has been incarcerated since 2010 and was, until recently, unaware that he may be eligible for the

relief described below. *See In re Saunders*, 2 La. App. 3 Cir. 1033, 1040 (1970) (excusing a seven-year delay in filing a habeas petition because petitioner "was unaware of the applicable law").

Second, as a general matter, habeas petitions are not untimely if "the question is one of excessive punishment." *See In re Ward*, 64 La. App. 2 Cir. 672, 675 (1966). One of the primary claims Mr. Smith could bring in a new petition is that his sentence violates the cruel or unusual punishment clause of the Louisiana Constitution, which is a question of excessive punishment.

III. Possible Claims

A. Mr. Smith's amended Abstract of Judgment reflects an illegal sentence under Louisiana Code of Criminal Procedure Article 120(b).

Mr. Smith's amended Abstract of Judgment, issued to him in 2013 at the conclusion of his direct appeal, lists a five-year enhancement under Article 120(b). It is generally clear from other documents and his direct appeal opinion that this enhancement should have been listed under Article 100(a). *People v. Smith*, No. E049586, 2013 WL 901027, at *4 (La. App. 2 Cir. 4/16/2013). However, the Abstract of Judgment, which is the official record of his sentence, has never been corrected.

This enhancement, as listed on his official documents, is illegal in two respects. First, even at the time of Mr. Smith's sentencing, any given application of Article 120(b) was limited to one year per prior prison term. *See* La. Code Crim. Proc. Ann. art. 120(b). It has never been permissible to impose a five-year enhancement under 120(b), rather each one-year enhancement was imposed and listed separately. *Id.* Second, after the passage of Senate Bill 136, all enhancements imposed under Article 120(b) except those relating to sexually violent crimes are now illegal and the Louisiana Department of Public Safety and Corrections (DPS&C) is

affirmatively obligated to grant inmates with such enhancements full resentencing. La. Code Crim. Proc. Ann. art. 890.5. Mr. Smith has not received such a resentencing, even though his Abstract of Judgement lists an enhancement under Article 120(b).

It is possible that the court will view this discrepancy as a mere clerical error, which can be corrected without implicating any broader relief. *See People v. Mitchell*, 26 La. App. 2 Cir. 181, 185 (2001) ("Courts may correct clerical errors at any time" and may order "correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts."); *see also In re Compton*, No. B204169, 2008 WL 5393188, at *3 (La. App. 3 Cir. 12/28/2022) (granting a habeas petition in part to correct an Abstract of Judgment, but denying broader relief requested by the petition). Despite this, I recommend that this claim be included in a new petition because at a minimum it could lead to Mr. Smith having a corrected official record of his sentence. Further, DPS&C views discrepancies between an inmate's Abstract of Judgment and applicable sentencing law as grounds for referral for full resentencing. *See* 15 La. Admin. Code tit. 22, § X-201. A referral is merely a recommendation and does not create a legal obligation for an inmate to be resentenced, but the inclusion of the discrepancy in a habeas petition may bring the issue to their attention.

B. Mr. Smith should have received a full resentencing in 2013 when the Article 120(b) enhancements were stricken from his sentence.

The five one-year enhancements that could have been legally imposed in 2010 for each of Mr. Smith's five prior prison terms were imposed but stayed by the sentencing judge, and then stricken from his sentence on direct appeal. In *People v. James*, the court defined Louisiana's "full resentencing rule," which establishes that "when part of a sentence is stricken on review, on remand for resentencing a full resentencing as to all counts is appropriate." 5 La. App. 5 Cir. 857,

893 (2017). Mr. Smith did not receive a full resentencing when his stayed 120(b) enhancements were stricken. *See People v. Smith*, No. E049586, 2011 WL 901027, at *4 (La. App. 2 Cir. 4/16/2011). He was instead issued an amended Abstract of Judgement with the five one-year 120(b) enhancements removed, and the judgment was "[i]n all other respects" affirmed." *Id.* (As noted above, the 2013 amended Abstract of Judgment retains the illegal five-year enhancement listed under Article 120(b)).

Although *James* was decided after Mr. Smith's convictions became final, it relied on a long line of Louisiana authority predating his convictions that describe the rationale for the full resentencing rule. *See, e.g., People v. Navarro*, 40 La. App. 2 Cir. 668 (2007); *People v. Burbine*, 106 La. App. 1 Cir. 1250 (2003). A 1986 case explained that a rule requiring full resentencing "is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components." *People v. Hill*, 86 La. App. 4 Cir. 834, 836 (1986). Mr. Smith was therefore entitled to a full resentencing in 2013 when the Article 120(b) enhancements were stricken from his sentence. I recommend that this claim be included in the new petition.

C. Mr. Smith's sentence violates the Equal Protection Clause because there is no rational basis for treating him differently than similarly situated defendants whose Article 120(b) enhancements were not stricken before the passage of Senate Bill 136.

As discussed, Senate Bill 136 added Article 890.5 to the code of criminal procedure, rendering most Article 120(b) enhancements invalid, and requiring DPS&C to resentence all implicated inmates. Mr. Smith's five Article 120(b) enhancements were stricken from his Abstract of Judgment not because they could not have been imposed at the time of his sentencing, but because they were "erroneously stayed" by the trial court. *People v. Smith*, No.

E049586, 2011 WL 901027, at *4 (La. App. 2 Cir. 4/16/2011). Had the five one-year priors that were originally imposed remained a part of his sentence, he would now clearly be entitled to a full resentencing under Article 890.5. Mr. Smith could argue that because there is no rational basis for treating him differently from those similarly situated defendants who are now entitled to resentencing, his sentence violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

In *People v. Simpson*, the Court of Appeal found that Article 3051, a provision Code of Criminal Procedure governing youth offender parole, violated the Equal Protection Clause. La. App. 4 Cir. 273, 277 (2022). They held that there was no rational basis for differentiating between young adult offenders sentenced to life without parole for special-circumstances murder, and other young adult offenders sentenced to life with the possibility of parole for other serious or violent crimes, including premeditated murder. *Id.* at 284. It was unconstitutional for the latter group to be granted a youth offender parole hearing while the former was not. *Id.* Mr. Smith's position is in some sense even stronger than the defendant in *Simpson* because while that defendant had been convicted of a more serious crime than those found to be similarly situated to him, Mr. Smith is receiving differential treatment from defendants with identical or more serious criminal records whose Article 120(b) enhancements remain on their sentence.

There is a serious counterargument, however, that Mr. Smith is not similarly situated to those defendants eligible for resentencing, because the length of his sentence was not actually increased by the stricken enhancements, while theirs were. The court in *Simpson* analyzed the legislature's intent in enacting Article 3051 and found that the purpose of allowing young adult offenders an earlier parole determination should be applicable to both categories of defendants. *Id.* at 287. The legislative history of Article 890.5, however, demonstrates that it was intended to

"ensure equal justice and address systemic racial bias in sentencing." 2021 La. Legis. Serv. Ch. 728 (S.B. 483). Because the length of Mr. Smith's sentence was not ultimately impacted by the stricken enhancements, it is difficult to argue that he was denied equal justice with respect to the former version of 120(b). Because of this, and because of the novelty of this claim (it has not been litigated in any available decision), I do not recommend it be included in the new petition.

D. New case law establishes that Mr. Smith's sentence of 33 years to life is impermissibly cruel or unusual under the Louisiana Constitution.

In 2018 the Louisiana Supreme Court found that a 15-years-to-life sentence for a defendant convicted of attempted first-degree assault and attempted felony extortion imposed under the repeat offender law constituted cruel or unusual punishment under the Louisiana Constitution. *People v. Hilton*, 57 So.3d 1134, 1138 (La., 2020). A punishment is cruel or unusual when it "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." *Id.* at 1145. A finding of disproportionality depends on 1) the nature of the offense and/or the offender with particular regard to the degree of danger both present to society, 2) the difference between the challenged penalty and punishments for more serious offenses in Louisiana, and 3) the difference between the challenged penalty and punishments for the same offense in other states.

When considering the nature of Hilton's offenses and him as an offender, the court took into account that his first two qualifying offenses were committed on the same occasion when he was under 25 years of age, and that all his qualifying offenses were remote in time. *Id.* at 1141. Although he had been to prison since then, the court characterized his later criminal history as neither serious nor violent, including, among other offenses, a felony drug possession conviction that has since been reclassified as a misdemeanor. *Id.* at 1143, 1148. His crimes were related to

alcohol abuse, and the court noted that the law is evolving in in its treatment of people struggling with addiction. *Id.* at 1144, 1148. Finally, his age at sentencing, 42 years old, was "relevant to his background, character, and prospects," because given the proposed sentence of 15 years, he would not have been eligible for parole until he was approaching 60. *Id.* at 1144.

Mr. Smith is in many respects a similar offender to the defendant in *Hilton*. All of Mr. Smith's previous qualifying offenses were committed on the same day in 1982, 28 years before the car accident, and when he was only 19 years old. Mr. Smith's other criminal history similarly includes prison terms for less serious felonies, two of which have also been reclassified as misdemeanors. Multiple of his crimes, including the car accident, were related to the addiction with which he struggled all his life. And his current possibilities for parole are even more distant: sentenced at age 48 and currently 60 years old, if Mr. Smith were to serve his full 33-year minimum term he would not be eligible for parole until age 81. In addition, Mr. Smith suffered from severe childhood trauma, which is considered a mitigating factor for sentencing purposes under Louisiana law. *See* La. Stat. Ann. § 138.

There is also an important dissimilarity between *Hilton* and Mr. Smith's case, which is the impact of the most recent offense. The court in *Hilton* relied heavily on the fact that crimes for which he was sentenced did not result in physical harm to anyone. 57 So.3d 1134 at 1142. Four people were injured in the accident for which Mr. Smith is currently serving his sentence. However, the year after *Hilton* was decided, in *People v. Jordan*, a repeat-offender sentence for assault with a deadly weapon was also held to be cruel or unusual under the Louisiana Constitution, in part because a 35-year sentence for a 58-year-old defendant amounted to de facto life imprisonment. 55 So.3d 1007, 1031 (La., 2021). It is therefore likely that the result in *Hilton* was not dependent on the non-violent nature of the crime.

As to prongs two and three of the disproportionality inquiry, which compare the challenged sentence to more serious crimes within Louisiana and the same crime in other jurisdictions, the court noted that the sentence must be compared to other recidivist sentences. *Hilton*, 57 So.3d at 1149. It would therefore be inappropriate to compare Mr. Smith's 33 years, for example, to the sentence for a non-recidivist reckless driving causing injury in another state. However, the court noted that the repeat-offender sentencing regime has undergone and continues to undergo "significant change[s]," which in sum show that "legislators and courts are reconsidering the length of sentences in different contexts to decrease their severity." *Id.* at 1150-1151. Relying in part on these evolving standards, the court found that Hilton's sentence of 15 years to life violated the Louisiana Constitution because, "even as a recidivist, [it] exceeds the punishment in Louisiana for second degree murder, attempted premeditated murder, manslaughter, forcible rape, and child molestation." *Id.* at 1152. Mr. Smith's sentence, of which he has already served 13 years, far exceeds Hilton's.

Because new holdings on substantive constitutional law apply retroactively, *Hilton* applies retroactively to Mr. Smith's case. *See In re Kirchner*, 2 La. 3 Cir. 1040, 1048 (2017); *see also Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016). And the evolving standards of decency analysis on which it relied should apply with even greater force to Mr. Smith given the changes that have occurred since *Hilton* was decided that further underscore the disproportionality of Mr. Smith's sentence. In 2021, Senate Bill 85 amended Section 127 of the Code of Criminal Procedure to instruct sentencing courts to dismiss enhancements resulting in sentences of more than 25 years, unless doing so "would threaten public safety." La. Stat. Ann. § 138(C)(2)-(3). Senate Bill 670 further restricted courts' discretion to impose the harshest possible penalties for all manner of crimes. La. Stat. Ann. §§ 1160; 1160.1. Other reforms have also occurred that

demonstrate the evolving standards that underly criminal sentencing in Louisiana. Because of the similarities between *Hilton* and Mr. Smith's case, and the reforms that have occurred since that decision, I recommend that this claim be included in the new petition.

E. Mr. Smith received ineffective assistance of counsel at his sentencing hearing.

Mr. Smith was entitled to effective representation at his sentencing hearing, including the presentation of readily available mitigating evidence. *People v. Grace*, 138 La. App. 4 Cir. 1207, 1212 (2006). It is possible, although difficult, to argue that he did not receive such effective representation. To demonstrate ineffective assistance of counsel under *Grace*, Mr. Smith would need to show that his counsel's performance both fell below an objective reasonable standard of care and prejudiced his case. *Id.* at 1212-1213. Mr. Smith's trial counsel on several occasions seems to have fallen below an objective reasonable standard of care. On at least three occasions she either failed to show up to court or arrived hours late, deficiencies for which she was assessed sanctions. However, she did prepare a *Pierce* motion which discussed some of the mitigating circumstances relevant to Mr. Smith, and to which she attached a 2007 psychological report that addressed his history of childhood trauma and mental health diagnoses. A *Pierce* motion is the mechanism through which defendants can argue that their prior qualifying offenses be disregarded for sentencing purposes. *See People v. Superior Ct. (Pierce)*, 12 La. 3 Cir. 497 (1995). Although Mr. Smith's counsel spoke only briefly about the motion at the sentencing hearing, the judge indicated that he had read and considered it before declining to disregard Mr. Smith's prior qualifying offenses.

It is therefore difficult to argue that Mr. Smith's counsel's failures prejudiced him in any significant way. Further, Mr. Smith has already brought a state habeas petition raising ineffective assistance of counsel. Although he focused on his counsel's infectiveness at trial rather than at

sentencing, the petition did raise her failure to show up on multiple instances, and the fact that she was sanctioned by the court. For these reasons, I do not recommend that an ineffective assistance claim be raised in a new petition.

Applicant Details

First Name	**Pablo**
Last Name	**Das**
Citizenship Status	**U. S. Citizen**
Email Address	**pabloaabirdas@gmail.com**
Address	**Address** Street **163 Attorney Street Apt 2D** City **New York City** State/Territory **New York** Zip **10002** Country **United States**
Contact Phone Number	**13017924158**

Applicant Education

BA/BS From	**Boston University**
Date of BA/BS	**May 2016**
JD/LLB From	**University of Southern California Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90513&yr=2009**
Date of JD/LLB	**May 10, 2022**
Class Rank	**15%**
Law Review/ Journal	**Yes**
Journal(s)	**Southern California Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Garry, Hannah
hgarry@law.usc.edu
213-740-9154

Brown, Rebecca
rbrown@law.usc.edu
213-740-1892

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Pablo Aabir Das
163 Attorney Street, Apt. 2D
New York, NY 10002

June 19, 2023

The Honorable Juan R. Sánchez
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106
Courtroom 14-B

Dear Judge Sánchez,

I hope this letter finds you well. I am applying for a September 2024 clerkship with your chambers.

I am currently a litigation associate at White & Case LLP in New York. In 2022, I graduated from the University of Southern California Gould School of Law with a 3.80 GPA. While at USC, I served as Executive Senior Editor on the Southern California Law Review and as an Advanced Student-Attorney in the International Human Rights Clinic.

For me, this clerkship is an important step towards a career in the federal government. I have a long-standing interest in civil rights law, especially as it pertains to protecting and expanding voting rights. I am confident that a clerkship with your chambers will strengthen my resolve, and provide me with critical legal analysis skills and administrative knowledge of the judiciary.

I have prepared for this clerkship by pursuing rigorous research and writing experiences. In the past two years, I have published four academic papers on topics including election law, the shadow docket, and international human rights. These pieces have appeared in the New York Times, the Southern California Law Review, the Virginia Law Review, and the Clooney Foundation for Justice. During law school, I externed with the S.E.C. and the U.S. Attorney's office, where I wrote memos on numerous substantive and procedural legal issues. Recently, at White & Case, I was part of two trial teams within my first ten months at the firm.

In my application package, I have included my resume, transcript, and two writing samples. I have also attached letters of recommendation from professors Rebecca Brown, Abby Wood, and Hannah Garry. I would be honored to have the opportunity to clerk with you.

If you would like to discuss my application, please feel free to reach me at pabloaabirdas@gmail.com or 301-792-4158. Thank you for your consideration.

Respectfully,

Pablo Aabir Das

PABLO AABIR DAS

pabloaabirdas@gmail.com | +1-301-792-4158 | New York, NY

EDUCATION

University of Southern California, Gould School of Law, Los Angeles, CA **Juris Doctor, May 2022**

GPA: 3.80, *honors*, merit scholarship

Activities: Executive Senior Editor, Southern California Law Review; Advanced Student-Attorney, International Human Rights Clinic

Publications: **(i)** "Deep in the Shadows?: Analyzing the Emergency Docket" (Pablo Das, Lee Epstein, Mitu Gulati, Apr. 2023 *Virginia Law Review*); **(ii)** "Morocco v. Radi" (Hannah Garry, et al., July 2022, *Clooney Foundation for Justice*); **(iii)** "The Emergency Docket" (Lee Epstein & Pablo Das, June 2022, report for the *N.Y. Times*); **(iv)** "Voting and Campaign Finance: Inconsistencies in Law and Policy" (Pablo Das, Dec. 2021, *Southern California Law Review*)

Boston University, Pardee School of Global Studies, Boston, MA **Bachelor of Arts, May 2016**

Major: International Relations Honors Program, *magna cum laude*

Awards: Senior Honors Thesis Award; Departmental Honors; University Research Award; White House Champion of Change

RELEVANT EXPERIENCE

White & Case, LLP, New York, NY

Summer Associate; Litigation Law Clerk *May 2021 — August 2021; September 2022 — Present*

- Prepared legal memos on issues such as choice-of-law, tax law, bankruptcy law, securities law, civil rights law, and others.
- Assisted in witness preparation and trial preparation for a successful arbitration and for a cross-border contract dispute.
- Started and currently lead a pro bono initiative representing formerly incarcerated individuals seeking the restoration of voting rights.

U.S. Attorney's Office, Central District of California, Los Angeles, CA

Legal Extern, Criminal & National Security Division *September 2021 — November 2021*

- Prepared legal memos on topics including public corruption, environmental crime, corporate fraud, and cybersecurity crime.
- Conducted research to assist the Public Corruption team in its investigation and prosecution of L.A. County public officials.
- Drafted successful Motion in Limine on evidentiary issues relating to hearsay exceptions for a cryptocurrency trial.

U.S. Securities & Exchange Commission, New York, NY

Law Student Honors Program, Enforcement Division *May 2020 — August 2020*

- Conducted legal research for enforcement matters including pyramid schemes, insider trading, and pump and dump schemes.
- Drafted a legal action memo on a transnational cryptocurrency fraud case for NY Enforcement staff.

Reggora, Boston, MA

Head of Growth & Strategy; Strategy Advisor *May 2018 — May 2020*

- Joined as a founding member of the fintech's executive team, and oversaw growth to 150 staff and >$50 million in fundraising.
- Managed the sales, finance, operations, and marketing teams to expand product to over 45 states and exceed $10 million in revenue.
- Served as a Strategy Advisor to the CEO from June 2020 – June 2022 consulting on regulatory reforms and fundraising initiatives.

Observer Research Foundation, New Delhi, India

Visiting Research Associate, Global Governance Initiative *September 2017 — May 2018*

- Published articles and reports on South Asian geopolitics with a focus on security, trade, diplomacy, and economic connectivity.

ADDITIONAL INFORMATION

Languages: English (native); Hindi (advanced); Spanish (basic).

Internship & Volunteer: U.N. Human Rights Council (Geneva); DNC Voter Protection Initiative (Washington, D.C.); RFK Human Rights Center (Washington, D.C.); National Campaign on Dalit Human Rights (New Delhi); X-Cel Volunteer Teaching (Boston, MA).

Interests: Houseplants; biodynamic wines; chess; tennis; Premier League soccer.

UNIVERSITY OF SOUTHERN CALIFORNIA
OFFICIAL ACADEMIC TRANSCRIPT

OFFICE OF THE REGISTRAR
LOS ANGELES, CA 90089-0912
(213) 740-7445

STUDENT NAME	STUDENT NUMBER	DATE	PAGE
Das, Aabir, S.	4717-1998-01	08-22-2022	1 of 3

ISSUE TO:

CONTROL #: 000002342881

RAISED SEAL NOT REQUIRED

This transcript is not valid without the university seal and the signature of the Registrar. A raised seal is not required.

Frank Chang
Registrar

--- Current Program of Study ---

--- USC Degrees Awarded ---

05/13/2022 Juris Doctor — Law

--- USC Cumulative Totals ---

Law Units Attempted: 92.0 Earned: 92.0 Available: 92.0 GPA Units: 53.0 Grade Points: 201.80 GPA: 3.80

Fall Semester 2019 (08-26-2019 to 12-18-2019)

LAW-515	3.4	3.0	Legal Research, Writing, and Advocacy I
LAW-509	3.2	4.0	Torts I
LAW-503	3.8	4.0	Contracts
LAW-502	3.4	4.0	Procedure I

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
15.0	15.0	15.0	51.80	3.45

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STUDENT NAME	STUDENT NUMBER	DATE	PAGE
Das, Aabir, S.	4717-1998-01	08-22-2022	2 of 3

Spring Semester 2020 (01-13-2020 to 05-15-2020)

Grades of Credit/No Credit were required in Spring 2020 in response to COVID-19 global pandemic.

LAW-531	CR	3.0	Ethical Issues for Public Interest, Government and Criminal Lawyers
LAW-516	CR	2.0	Legal Research, Writing, and Advocacy II
LAW-508	CR	3.0	Constitutional Law: Structure
LAW-507	CR	4.0	Property
LAW-504	CR	3.0	Criminal Law

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
15.0	15.0	0	0	0.00

Fall Semester 2020 (08-17-2020 to 12-16-2020)

LAW-622	4.1	2.0	Money in Politics
LAW-621	4.1	3.0	Gender Discrimination
LAW-603	3.6	4.0	Business Organizations
LAW-767A	CR	1.0	Law Review Staff
LAW-849	CR	5.0	International Human Rights Clinic I

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
15.0	15.0	9.0	34.90	3.87

Spring Semester 2021 (01-11-2021 to 05-14-2021)

LAW-890	CR	3.0	Directed Research
LAW-865	3.8	3.0	Legislative Policy Practicum
LAW-608	3.7	4.0	Evidence
LAW-768	CR	1.0	Law Review Writing
LAW-767B	CR	1.0	Law Review Staff
LAW-850	3.9	5.0	International Human Rights Clinic II

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
17.0	17.0	12.0	45.70	3.80

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STUDENT NAME	STUDENT NUMBER	DATE	PAGE
Das, Aabir, S.	4717-1998-01	08-22-2022	3 of 3

NOTE: PHOTOCOPIES ARE NOT TO BE CONSIDERED OFFICIAL TRANSCRIPTS.THE REGISTRAR'S SEAL AND SIGNATURE APPEAR ON THE FIRST PAGE.

Fall Semester 2021 (08-23-2021 to 12-15-2021)

LAW-781	CR	4.0	Externship I
LAW-769A	CR	3.0	Law Review Editing
LAW-532	4.1	3.0	Constitutional Law: Rights
LAW-893	4.1	5.0	Advanced Clinical Training

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
15.0	15.0	8.0	32.80	4.10

Spring Semester 2022 (01-10-2022 to 05-13-2022)

LAW-893	4.2	3.0	Advanced Clinical Training
LAW-867	4.1	3.0	Corporate Fraud
LAW-769B	CR	3.0	Law Review Editing
LAW-683	3.9	3.0	Fact Investigation and Discovery
LAW-602	CR	3.0	Criminal Procedure

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
15.0	15.0	9.0	36.60	4.06

End of Transcript

June 19, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to give my enthusiastic support for Mr. Pablo Abir Das's application to clerk in your Chambers. I have known Pablo since April 2020 when I interviewed him for enrollment in the International Human Rights Clinic at the University of Southern California ("USC") Gould School of Law, which I direct. He was one of eight students invited to participate in the Clinic in the 2020-2021 academic year after a competitive interview and application process. During his time in the Clinic as a student attorney, he worked on average 20 hours per week.

In the Clinic, I supervised Pablo on two projects. Both involved monitoring the trials of journalists and human rights defenders in Morocco and Kyrgyzstan with the Clooney Foundation's TrialWatch Initiative. This work involves training of local monitors to attend the trial's hearings for purposes of taking detailed notes and collecting the case file; in-depth interviewing of defense counsel on the case as well as legal experts and human rights experts on the legal system in-country; and researching international human rights standards and jurisprudence with respect to a fair trial. All of this work is done for purposes of drafting and publishing a report analyzing and rating the fairness of the trial under international standards in order to deter Kyrgyzstan, Morocco and other countries from weaponizing their judicial system against political opponents and dissidents critical of the government. During his time in the Clinic, in addition to the above mentioned activities, Pablo played the leading role in researching and assisting me (as a TrialWatch expert) with drafting a trial monitoring report of a trial against journalist Omar Radi, ultimately concluding that the trial was riddled with violations of fair trial rights that Morocco is bound to uphold under international human rights law including: violations of the right to presumption of innocence; the right not to be arbitrarily detained or subjected to inhumane treatment; the right to call and examine witnesses; and the right to an impartial tribunal.

Having worked closely with Pablo, and having clerked myself on the 11th Circuit U.S. Court of Appeals, I can say that he is exactly the sort of individual that makes for an ideal law clerk. First, Pablo is very intelligent and is a quick learner. This became evident not only from the high quality of his work product, but also from my discussions with him in our seminar class and supervision meetings. He was well-prepared, and his questions and comments were always quite insightful and relevant as we discuss the assigned reading and how to apply the law to the facts of a particular case.

Second, Pablo has strong research and writing skills. He quickly grasps complex issues, researches them thoroughly (displaying ease in working with treaty, international jurisprudence, and foreign law in addition to U.S. law sources for purposes of my Clinic), and turned around a solid draft efficiently and effectively. His organizational skills were exceptional. He conducted research with determination and turned around very solid first drafts effectively. With some clear feedback and guidance on his first drafts, which he incorporated well, his writing became even more organized, consistent and clear over time.

Third, Pablo displayed a hard work ethic and always completed his Clinic work in a professional manner, multi-tasking between his Clinic projects with ease. In spite of the lengthy and complex research and drafting assignments for the TrialWatch work, he produced several drafts along the way for my review, appropriately seeking further guidance on a regular basis, and responding well to constructive feedback. Pablo always had a deep understanding of the facts of the cases and took time each week to ensure he was up to date on them, including monitoring news reports and staying in touch with counsel.

As a result of all of the above, I was delighted to invite Pablo back to the Clinic during his third year of law school to enroll in my Advanced Clinical course where he continued on with the TrialWatch work, but also helped to supervise two new second year Clinic student attorneys. In that role, he found the perfect balance of leading while also empowering the new students to gradually take over the processes for which he had been primarily responsible. With respect to his grades, Pablo easily stood out in the Clinic, and I awarded him the second highest grade in the class for his first year, a 3.9 (A), and a 4.1 (A+) during his second year as an Advanced Clinical student.

Finally, I would point out that Pablo has had work experience observing Judges through his Clinic work. As such, he has a good understanding of the judicial role as well as the intense demands and complex issues that Judges face. He is also well-attuned to understanding and working within different jurisdictions, adjusting to differing procedural and substantive rules well.

On a more personal level, Pablo is a confident, grounded young man with a nice sense of humor. In his work, I found that he was utterly dependable and responsible. He took initiative and was not afraid of challenges. He is the sort of person that anticipates the needs of his supervisors before they do. Not only did he work well independently, but he was also a team player. In all of his assignments for the Clinic, he worked closely with one to three other students and exhibited excellent communication and collaboration skills. The teams review each other's research and drafting, maintain the case files, and lead seminar classes together on their casework. In the team setting, Pablo played a natural leadership role, leading by example. If there was one area to critique Pablo on, it would be that he perhaps tends to take on too much and, as a result, sometimes failed in the Clinic to pay sufficient attention to detail. He improved on that over time. In sum, Pablo is a real pleasure to interact with both professionally and socially.

For these reasons, I highly recommend Pablo as a clerk in your Chambers. If you need any further information about him, please

Hannah Garry - hgarry@law.usc.edu - 213-740-9154

do not hesitate to write or call.

Best Regards,

Hannah Garry

Hannah Garry - hgarry@law.usc.edu - 213-740-9154

June 19, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Pablo Das is one of the strongest clerkship candidates whom I have recommended in my career, over thirty years. Every few years a student comes along who impresses me deeply with a combination of intellectual horsepower, personal drive and public-spirited values. This year, that student is Pablo Das.

Pablo was in two of my classes, first-year structural constitutional law and an upper-class course in constitutional rights. He absolutely excelled in both. The first-year course was the year that the world turned upside-down with Covid, and my class was entirely on zoom. This was an incredibly difficult time for students, who found themselves isolated and even more insecure than first-year students normally feel. Pablo was a clear standout in maturity, dedication, and brilliance in his performance in class. And in the rights course the following fall, he earned an A+.

A brief story will illustrate both the depth of my belief in Pablo and why he deserves it. In the fall of Pablo's 2L year, a distinguished scholar who was joining our faculty asked me if I knew a talented student who could help her with an important empirical project regarding the emergency docket of the Supreme Court, and I immediately thought of Pablo, who enthusiastically allowed me to suggest his name. The problem was, my colleague had not yet officially joined our faculty and so there was no funding to pay a research assistant. I went back to Pablo to say, too bad it didn't work out. His response was that he "needed more to do" and was so excited to work on the project that he would be happy to do it without compensation. Being on the law review and garnering all A+ grades that fall semester was apparently not enough to keep him busy. So he went to work, and my friend was thrilled with his help. Indeed she named him as a co-author on the project (not a normal procedure for a research assistant), and their piece was cited in the New York Times.

The reason Pablo is so impressive is, in part, his boundless intellectual energy. He brought that energy to class, and but for a slow start his first semester and the law school's decision to make the Covid semester pass-fail, he would likely be at the very top of the class rather than a hair's breadth below the top. He brought that energy to his many endeavors in law school, all devoted to public service: serving as an extern at the U.S. Attorney's Office, dedicating himself to the International Human Rights clinic, serving on the executive board of the Law Review, volunteering with a voting protection initiative, serving as Vice President of our student chapter of the American Constitution Society—a platform he used to highlight the issue of voting rights. Pablo will eventually work for the government, and a clerkship will help him enhance his fluency with all aspects of public law.

You will find Pablo to be an extremely positive addition to any team on which he works. He is indefatigable and upbeat, concerned and empathetic, generous and responsible. These attributes mean that he is not only very smart but also able to use his talents to constructive ends. He is a joy to have around. He has my highest recommendation.

Very truly yours,

Rebecca L. Brown
The Rader Family Trustee Chair in Law

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This writing sample was not edited by any third-parties and no one else contributed to the research.

Parts of the memo have been removed or revised, including a facts/application section, for confidentiality reasons. However, the vast majority of the legal analysis remains.

To: N/A

From: Pablo Aabir Das

Date: N/A

Re: Scope and Application of Revised SEC Statute of Limitations

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This memorandum analyzes potential arguments to support the claim that the recently extended statute of limitations period – from five to ten years – codified in Section 6501 of the 2021 National Defense Authorization Act ("NDAA") only applies to primary defendants and not relief defendants.

There is limited case law litigating the scope of the new statute of limitations. The available law involves the retroactivity of the limitations period rather than whether the revised limitations period applies to relief defendants and primary defendants in equal measure.

As a result, the strongest argument is to assert that a narrow reading of Section 6501's text excludes relief defendants from the new 10-year period.

Background

The 2021 NDAA reauthorization contained a small provision extending the statute of limitations from five years to ten years in disgorgement claims for scienter-based securities violations, including violations of Section 10(b) of the Exchange Act; Section 17(a)(1) of the Securities Act of 1933; and Section 206(1) of the Investment Advisors Act of 1940. *See* National Defense Authorization Act, Pub. L. No. 116-283, § 6501, 134 Stat. 388, 4626 (2021). Additionally, the 10-year limitations period now applies to all claims for equitable relief. *Id.* ("The Commission

may seek a claim for any equitable remedy, including for an injunction or for a bar, suspension, or cease and desist order, not later than 10 years after the latest date on which a violation that gives rise to another claim occurs.").

Current Case Law

There is limited Congressional debate on the scope of Section 6501, and there is not a clear record of which defendants Congress wanted the extended limitations period to apply to. However, since the NDAA passed, there have been several cases in which Second Circuit courts applied the 10-year limitations period to both primary and relief defendants, including one recent Eastern District of New York case. In each of these cases, the defendant challenged the application of the new statute of limitations. However, the grounds for these challenges were not predicated on the parties' status as relief defendants. At the same time, the courts did not clearly distinguish between the relief and primary defendants in applying the 10-year limitations period, which opens the door for a unique statutory interpretation argument.

- In *SEC v. Xia*, the primary and relief defendants jointly claimed that the SEC's claims were time-barred because they "gave retroactive effect to resurrect already extinguished claims." 2022 U.S. Dist. LEXIS 221555, at *31 (E.D.N.Y. Dec. 8, 2022); *see also* Defs. Mot. to Vacate at 24 (Doc. No. 179). In response, the courts found the claims timely and stated, "[r]elying on the plain text of the NDAA, courts have uniformly concluded that the NDAA is retroactive in its application and revives some previously time-barred claims filed after January 2021." *Xia*, 2022 U.S. Dist. LEXIS 221555, at *31.

- Similarly, in *SEC v. Stubos*, the primary and relief defendants asserted that the claims against them were time-barred because the NDAA did not retroactively revive scienter-based claims. 2022 U.S. Dist. LEXIS 185774, at *22 (S.D.N.Y. Oct. 10, 2022). In *Stubos*, the court closely examined the text and available history of the NDAA and ultimately concluded that the revised statute of limitations had "some retroactive effect and, in turn, revive[d] some time-barred claims." *Id*. at *36–37.

- Finally, in *SEC v. Ahmed*, only the relief defendants contested that the applicability of the extended statute of limitations to support their argument that their disgorgement obligations should be recalculated. 2021 U.S. Dist. LEXIS 112987, at *13–17 (D. Conn. June 16, 2021). The defendants had two primary arguments: (1) that the NDAA cannot be applied retroactively to revive time-barred claims, and (2) that even if the 10-year period were to apply to relief defendants, it should only apply to claims dated ten years back from the NDAA's enactment, not from the commencement of the current proceedings. *Id.* In response, the court stated that the limitations period applied to all "pending" case, including the one at hand. *Id.* at *16.

Again, there is nothing in these cases that would preclude a statutory interpretation argument, but they provide a lay of the land regarding current case law. In fact, they suggest that courts have yet to consider the express issue of whether relief defendants specifically fall under the extended statute of limitations period. As a result, a close reading of the statute's text could support the argument that relief defendants are intentionally excluded.

Relevant Rules of Statutory Interpretation

When a statute's interpretation is at issue, courts must always defer to clear statutory text. *AK Futures LLC v. Boyd St. Distro, LLC*, 35 F.4th 682, 692 (9th Cir. 2022). If the statutory text is vague of subject to multiple viable interpretations, then courts are encouraged to look at the legislative intent of the statute for guidance. *United States v. Daas*, 198 F.3d 1167, 1184 (9th Cir. 1999). However, "if the legislative intent remains unclear after examining the text, context, and legislative history, then the court is allowed to resort to other methods of statutory construction, such as determining what the legislature would have intended had it considered the issue." *Id.* Another method of statutory construction is "construing the language in a manner consistent with the statute's purpose." *Cal. Ins. Co. v. Stimson Lumber Co.*, 2004 U.S. Dist. LEXIS 10098, at *48 (D. Ore. May 26, 2004); *see also Lil' Man in the Boat, Inc. v. City & Cty of San Francisco*, 5 F.4th 952, 960 (9th Cir. 2021) ("Legislative history from both the original enactment and intervening amendments helps to divine congressional intent.").

Notably, in many cases interpreting ambiguous statutory text with limited legislative history, courts ruled in favor of a broad interpretation of the statutory language after considering the policy objectives to the statute. *See, e.g.*, *Sierra View Local Health Care Dist. v. Influence Health, Inc.*, 2017 U.S. Dist. LEXIS 7718, at *15 (E.D. Cal. Jan. 18, 2017) (construing the disputed language broadly after considering the purpose and context of the entire statute); *Gonzalez v. Marriott Int'l, Inc.*, 142 F. Supp. 3d 961, 976 (C.D. Cal. 2015) (analyzing the statute's "overarching purpose" and interpreting the disputed language broadly as a result). Courts' track record of deferring to broader readings of statutory text could cut against an argument in favor of a narrow reading.

Potential Statutory Construction Arguments

Given the analysis above, the best arguments supporting the contention that the extended statute of limitations only applies to primary and not relief defendants are:

(1) That the text of Section 6501 fails to specifically mention relief defendants, and thus should be read narrowly as only applying to the conduct of primary defendants; and

(2) Even if the court considers a broader reading of Section 6501, it should still exclude relief defendants because there is no policy indication that the extended statute of limitations applies to relief defendants. In fact, there is some suggestion that Congress' primary concern was conduct by the fraudulent actors themselves, not the passive recipient of the illicit proceeds.

First, the Supreme Court has stated that "when Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 168 (2009). As a result, if one statute's language is expanded or amended, it should be read narrowly and not interpreted to affect other parts of the statute. Here, Congress did not extend the statute of limitations for *all* securities violations and their corresponding statutes, but instead focused on expanding the statute of limitations for certain securities violations, thus effectively only expanding part of the relevant statutes.

Furthermore, courts have distinctly considered issues pertaining to primary defendants and relief defendants. *See United States SEC v. Berkeley Healthcare Dynamics, LLC*, 2022 U.S. App. LEXIS 245, at *2 (9th Cir. Jan. 5, 2022) ("We have long distinguished between 'primary wrongdoers' and 'relief defendants' in addressing disgorgement under [] securities law.").

Therefore, because the language of Section 6501 does not specifically state that the extended statute of limitations applies to relief defendants, the court should narrowly read that the scope of the extended limitations period only applies to primary defendants.

To note, the success of this argument may be limited by two points: (1) prior to the 2021 NDAA, when the five-year limitation period still applied, it appears that there was no language distinguishing primary defendants from relief defendants regarding the statute of limitations, and (2) in *Xia* (summarized above), the court stated that "it is clear that [Section 6501] of the NDAA extends the statute of limitations period for SEC enforcement actions that ordinarily would be governed by [28 USC] § 2462." *Xia*, 2022 U.S. Dist. LEXIS 21555, at *35 n.32.

Second, if the court chooses to consider an expanded interpretation of Section 6501, it can be argued that there is limited legislative history supporting the proposition that Section 6501 was intended to include relief defendants. Relief defendants are typically not accused of any wrongdoing and are not liable for any securities violations; instead, they are merely nominal parties to the action. *See SEC v. Cherif*, 933 F.2d 403, 414 (7th Cir. 1991) (stating that 'relief' or 'nominal' defendants have "no claim[s] against [them]" and their "relation to the suit is merely incidental").

Here, the limited purpose of Section 6501 appears to be to expand the SEC's enforcement against bad actors, and Congressional statements have supported this interpretation. *See Press Release*, H. Fin. Servs. Comm. (Dec. 3, 2020), https://financislservices.house.gov/news/documentsingle.aspx?DocumentID=407049 (citing the

NDAA as a measure that will "close loopholes and increase penalties on those **bad actors**" who are exploiting the financial system) (emphasis added); Oversight of the SEC's Division of Enforcement: Hearing Before the H. Fin. Servs. Comm. (May 16, 2018) (statement of Stephanie Avakian & Stephen Peikin, Co-Directors, Division of Enforcement) (stating that an expanded statute of limitations will help the SEC pursue claims against "**fraudulent actors**" or those who have violated federal securities law) (emphasis added).

As a result, the primary defendants were arguably the only bad or fraudulent actors that Congress sought to target with the expanded limitations period. Moreover, there is an argument that Congress only chose to include violations of the anti-fraud provisions and not the thousands of other potential violations under securities law because they wanted to reach the egregious conduct. Thus, under this interpretation, relief defendants should be excluded from the revise 10-year statute of limitations.